Public Prosecutor v Tan Tatt Eek & other appeals

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APEALS NO 05–40 OF 2002(W), 05–41 OF 2002(W), 05–68 OF 2002(P) AND 05–70 OF 2002(P)

AHMAD FAIRUZ CHIEF JUSTICE, ABDUL MALEK AHMAD PCA, HAIDAR CJ (MALAYA), STEVE SHIM CJ (SABAH & SARAWAK), SITI NORMA YAAKOB, PS GILL FCJJ AND AUGUSTINE PAUL JCA

3 FEBRUARY 2005

Criminal Law — Dangerous drugs — Trafficking — Presumption — Whether 'deem' in s 37(d) had same meaning as 'found' in s 37(da) — Whether presumption of possession under s 37(da) can be used to invoke presumption of trafficking under s 37(da) — Whether decision in Muhammed bin Hassan wrongly decided — Dangerous Drugs Act 1952 ss 37(d) & (da)

Criminal Law — Dangerous drugs — Trafficking — Application of double presumption — Intention of Parliament — Whether double presumption oppressive and objectionable — Dangerous Drugs Act 1952 ss 37(d) & (da)

Criminal Law — Dangerous drugs — Trafficking — Presumption of trafficking — Whether should be construed literally — Whether penal in nature — Dangerous Drugs Act 1952 ss 37(d) & (da)

Evidence — Presumption — Drug trafficking — Application of double presumption — Intention of Parliament — Whether double presumption oppressive and objectionable — Dangerous Drugs Act 1952 ss 37(d) & (da)

Evidence — Proof of — Drug trafficking — Whether proof of possession must be by direct evidence and not by way of presumption — Evidence Act 1950 ss 3 & 4(3) — Dangerous Drugs Act 1952 ss 37(d) & (da)

Words and Phrases — 'Found' — Dangerous drugs Act 1952 ss 37(d) & (da)

Words and Phrases — 'Deem' — Dangerous drugs Act 1952 ss 37(d) & (da)

The issue was whether the presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952 ('the Act') could arise out of a presumption of possession under s 37(d) thereof. The court was urged to overturn the principle against double presumptions as laid down in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. *Muhammad bin Hassan* had decided that to constitute 'possession' under s 37(da) of the Act, there must be an express affirmative finding of possession and not a legal presumption of possession as provided in s 37(d) of the Act.

The prosecution submitted that *Muhammed bin Hassan* had been wrongly decided as the court had misdirected itself:

(1) when it applied the strict construction rule in construing the two subsections. The court was said to have wrongly held that the two subsections were penal in nature;

(2) when it declared that the intention of Parliament was that the two subsections may not be invoked and applied in conjunction with one another. The prosecution submitted that Parliament have intended the two subsections to be applied in tandem and not separately or individually because sub-s (da) was inserted immediately after sub-s (d) when it could have been inserted after sub-s (j) of the same section as sub-s (k);

(3) when it applied the general law of evidence in construing the two subsections. The prosecution submitted that the effect of ss 3 and 4(2) of the Evidence Act 1950 when read together shows that the court is not concerned with how a fact is proved, ie whether by direct evidence or presumption; and

(4) when it gave an unacceptable meaning to the word 'found' used in s37(da) in that the court misdirected itself when the court treated the 'deeming' provision in s 37(d) as equivalent to the 'presumption' provision in s 37(da).

Held, by majority affirming the decision in *Muhammad bin Hassan*:

(1) (per **Ahmad Fairuz Chief Justice**) This court had disposed of the issue in the negative — ie the presumptions must not be considered as evidence of possession (see para 1). The court's approach in applying the literal interpretation rule was correct (see para 8). Applying the literal interpretation rule for the words under ss 37(d) and 37(da) means that when the prosecution proved that a person had custody and control over something that contains dangerous drugs, the presumption of possession would arise. Whereas to invoke presumption of trafficking, a person must be found in possession, and not deemed to have been in possession of the dangerous drugs (see para 11).

(2) (per **Ahmad Fairuz Chief Justice**) What was relevant was a penal statute and not a penal provision. Section 37 was a provision under the Act that undisputedly was a penal statute (see para 13).

(3) (per **Ahmad Fairuz Chief Justice**) The provisions of ss 37(d) and 37(da) were clear and must be interpreted literally and as such there was no need for the court to refer to the speech of the YB Minister in the Parliament (see para 15).

(4) (per **Abdul Malek Ahmad PCA**) Section 37(da) of the Act does not start with 'any person who is deemed in possession' shall be presumed to be trafficking, in which case it will be considered a consequence of s37(d) of the Act. Instead, the word 'found' is inserted and so there must be a finding of possession first before the presumption of trafficking

comes about. Therefore, the decision in *Muhammed bin Hassan* is correct (see para 43).

(5) (per **Abdul Malek Ahmad PCA**) Any decision made, without the necessity of a prospective ruling, can apply only to pending cases irrespective of whether at first instance or at the appellate stage. It certainly does not apply to cases already disposed of at the highest appellate level (see para 46); *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 not followed.

(6) (per **Steve Shim CJ (Sabah & Sarawak)**) In an appropriate case where there is sufficient or ample evidence to establish actual possession under s 37(da), there would be no necessity for a trial judge to invoke the statutory presumption of possession under s 37(d). The Federal Court in *Muhammed bin Hassan* had not lost sight of this proposition wherein the court stated that in a proper case where the evidence so warranted, there was nothing to prevent the trial judge from coming to a factual finding of possession (see para 69).

(7) (per **Steve Shim CJ (Sabah & Sarawak)**) The 'rule against double presumption' required that a trial judge should carry out a separate exercise under s 37(da) when determining whether an accused was found in possession. In other words, the presumption of possession under s37(d) is separate and distinct from the phrase 'found in possession' appearing in the prescription created by s 37(da) of the Act (see para 72); *Shariff bin Kadir v Public Prosecutor* [2003] 2 MLJ 203 followed. There was no valid basis to revisit *Muhammed bin Hassan* in terms propagated by the prosecution (see para 74).

(8) (per **Siti Norma Yaakob FCJ**) The same exercise to revisit and review *Muhammed bin Hassan* had already been undertaken by a three member panel of this court in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 and by a five member panel in *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259. As such there was no justification for another revisit (see para 90).

(9) (per **Siti Norma Yaakob FCJ**) The two subsections were special provisions relating to the creation of rebuttal presumptions which were of evidential value in trials of offences prescribed under the Act — and therefore strictly not penal in nature — but viewed in the broader sense that they form part of a penal statute, it was not objectionable to the two subsections being construed strictly and must not be extended beyond their clear meaning (see para 99).

(10) (per **Siti Norma Yaakob FCJ**) Short of Parliament stating that both subsections are to be read conjunctively in clear and uncertain terms, the intention of Parliament cannot be ascertained in the order in which amendments were incorporated into an Act. The fact that the provisions

of sub-s (da) follow immediately after sub-s (d) may well be attributed to convenience and the art of drafting (see para 104).

(11) (per **Siti Norma Yaakob FCJ**) There was a distinct difference in the wording and meanings of the two subsections, and it is this difference that rule against the prosecution's contention that the finding of deemed possession under sub-s (d) can be read into sub-s (da) as proved possession, to trigger the presumption of trafficking (see para 109).

(12) (per **Siti Norma Yaakob FCJ**; **Ahmad Fairuz Chief Justice** and **PS Gill FCJ** concurring) Rulings from this court, particularly when it decides to resolve conflicts arising from separate decisions on points of law, are never intended to be interpreted retrospectively so as to prevent the danger of uncertainty or disturb the basis on which contracts and fiscal arrangements had been entered into. As such, restrospectivity can only operate in pending cases but not where cases have been decided to their finality (see paras 18, 112 and 148).

(13) (per **PS Gill FCJ**) It was not correct to state that in *Muhammed bin Hassan* the court applied the strict construction rule. Indeed, it was clear that the literal rule of construction was applied (see para 117). As to the speeches in Hansard, it made no mention of the intention of Parliament regarding the applicability of the double presumption. Furthermore, the two subsections which the court was called upon to construe, suffer no ambiguity (see paras 120 and 142).

(14) (per **PS Gill FCJ**; **Siti Norma Yaakob FCJ** concurring) As regards the intention of Parliament, the correct approach is to ascertain the meaning of the words employed by Parliament rather than the intention of Parliament (see paras 109 and 122); *Black-Clawson International Ltd v Papierwerke Ag* [1975] 2 WLR 513 and *Muhammad bin Hassan* followed.

(15) (per **PS Gill FCJ**) It is pertinent to note that s 4(2) of the Evidence Act 1950 only qualifies it to that particular Act, and excludes its application to presumptions other than those found in the Evidence Act 1950 (see para 127). Therefore, the words 'this Act' appearing in s 4 of the Evidence Act exclude its application to presumptions other than those found in the Evidence Act (see para 128); *Tun Datu Haji Mustapha Bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (NO 2)* [1986] 2 MLJ 420 followed.

(16) (per **PS Gill FCJ**) The distinction between the word 'deem' and 'presume' is a very fine one, if at all (see para 138). In fact, the title to s 37 of the Act refers to 'Presumptions', and no distinction is drawn in the Act between the word 'deem' and 'presumption'. That being the case, it is clear that the legislature did not draw any difference between the word 'deem' and 'presumption' as used interchangeably in the Act (see para 139).

(17) (per **PS Gill FCJ**) The court was compelled not to depart from *Muhammed bin Hassan* for a number of reasons: (i) it should not interpret the intention of Parliament by merely importing words from dictionary meaning. The Hansard which can be used as an aid to interpret the intention of Parliament was of no assistance in the present case (see para 142); (ii) the operation of the presumptions under s 37(d) and (da) of the Act in tandem must be express, clear and unequivocal and cannot be exercised by inference, or conjecture particularly in criminal proceedings (see para 144); the court should not interfere or usurp the functions of the legislature (see para 145); and it is a bad policy for the apex court to leave the law in a state of uncertainty by departing from its recent decisions (see para 146); *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 followed.

(18) (per **Augustine Paul JCA**, dissenting on the application of double presumptions) The phrase 'found in possession' in s 37(da) must be interpreted as it stands in its ordinary meaning. A finding is made by the court upon a consideration of all the evidence adduced in a trial (see para 156). A presumption of law (like s 37(d)) must ordinarily come within the meaning of 'found in possession' in s 37(da); thereby bringing 'deemed' possession within its ambit (see para 159).

(19) (per **Augustine Paul JCA**) The word 'proved' and 'found' includes a presumption as there is no material difference between both the concepts. The effect of the judgment in *Muhammed bin Hassan* was to narrow down the scope of the presumption in s 37(d) (see para 160).

(20) (per **Augustine Paul JCA**) Section 37 which deals with various presumptions has been designed by its clear words to apply to all proceedings under the Act. The inevitable conclusion is that s 37(d) is not restricted in its application to any proceeding under the Act (see para 164). Section 37(d) therefore applies to s 37(da). The result is that 'deemed' possession in s 37(d) cannot be excluded from the ambit of s37(da). Even though this approach amounts to the operation of a presumption upon a presumption it is not unlawful as it is expressly authorised by Parliament (see para 166). It follows that the ordinary meaning of the phrase 'found in possession' in s 37(da) is not restricted in any way even though it involves a presumption. It must therefore include a conclusion of law thereby bringing 'deemed' possession in s 37(d) within its scope (see para 167).

(21) (per **Augustine Paul JCA**) The presumption of possession arising from s 37(d) does not, on its own, raise the presumption of trafficking under s 37(da). Evidence of the weight of the drugs involved must be adduced in order to invoke s 37(da) upon proof of possession under s 37(d). The basic facts to be proved for the activation of both the presumptions were therefore different. As the double presumptions contained in s 37(d)

and s 37(da) were clear in their requirement of the different basic facts to be proved, they were not harsh and oppressive and must prevail even if the intention of Parliament in creating them was not clear (see para 172).

[**Bahasa Malaysia summary**

Isu adalah sama ada anggapan pengedaran di bawah s 37(da) Akta Dadah Berbahaya 1952 ('Akta tersebut') boleh berbangkit dari anggapan milikan dibawah s 37(d). Mahkamah diusul untuk membalikkan prinsip menentang anggapan berganda sebagaimana yang dinyatakan di dalam *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. *Muhammad bin Hassan* memutuskan bahawa untuk menjadi 'milikan' di bawah s 37(da) Akta tersebut, mestilah terdapat keputusan mengenai milikan yang nyata dan bukan anggapan milikan pada undang-undang sebagaimana yang diperuntukkan di dalam s 37(d) Akta tersebut.

Pendakwa raya menghujahkan bahawa *Muhammed bin Hassan* telah tersilap putus oleh kerana mahkamah telah tersalah arah dirinya:

(1) semasa ia mengguna pakai kaedah pentafsiran yang ketat dalam mentafsirkan kedua-dua sub-seksyen tersebut. Mahkamah dikatakan telah salah memutuskan yang kedua-dua sub-seksyen tersebut berbentuk penal;

(2) apabila ia mengisytiharkan yang niat Parlimen bahawa kedua-dua sub-seksyen itu tidak boleh diguna dan dipakai secara bersama. Pendakwa raya menghujahkan yang Parlimen berniat bahawa kedua-dua subseksyen tersebut diguna pakai secara bersama dan bukan berasingan atau secara sendirian kerana sub-s (da) diletakkan sejurus selepas sub-s (d) sedangkan ia dapat meletakkan selepas sub-s (j) seksyen tersebut sebagaimana sub-s (k);

(3) apabila ia mengguna pakai undang-undang keterangan am dalam mentafsirkan kedua-dua subseksyen tersebut. Pendakwa raya menghujahkan bahawa kesan ss 3 dan 4(2) Akta Keterangan 1950 apabila dibaca bersama menunjukkan bahawa mahkamah tidak mengambil berat bagaimana satu fakta dibuktikan, iaitu sama ada dengan keterangan langsung atau anggapan; dan

(4) apabila ia memberikan maksud yang tidak dapat diterima kepada perkataan 'dijumpai' yang digunakan di dalam s 37(da) iaitu mahkamah telah tersalah arah dirinya apabila mahkamah mengolah peruntukan 'menyifatkan' di dalam s 37(d) adalah sama dengan peruntukan 'anggapan' di dalam s 37(da).

Diputuskan, secara majoriti mengesahkan keputusan di dalam *Muhammad bin Hassan*:

(1) (oleh **Ahmad Fairuz Ketua Hakim Negara**) Mahkamah ini telah menyelesaikan isu itu dengan secara negatif — iaitu anggapan-anggapan itu tidak boleh disifatkan sebagai kesaksian (evidence) pemilikan (lihat

perenggan 1). Pendekatan mahkamah ini di dalam memakai kaedah pentafsiran literal itu adalah tepat (lihat perenggan 8). Menggunakan kaedah pentafsiran literal kepada perkataan-perkataan di dalam peruntukan s37(d) dan s 37(da) akan membawa maksud bahawa apabila pihak pendakwa membuktikan seseorang itu mempunyai jagaan atau kawalan ke atas sesuatu yang mengandungi dadah berbahaya, maka anggapan pemilikan akan timbul. Manakala untuk menimbulkan anggapan mengedar dadah berbahaya, seseorang itu mestilah didapati memiliki, bukannya dianggap memiliki dadah berbahaya tersebut (lihat perenggan 11).

(2) (oleh **Ahmad Fairuz Ketua Hakim Negara**) Yang relevannya ialah statut penal dan bukan peruntukan penal. Seksyen 37 adalah peruntukan dalam Akta itu yang tidak dinafikan adalah statut penal (lihat perenggan 13).

(3) (oleh **Ahmad Fairuz Ketua Hakim Negara**) Peruntukan s 37(d) dan s 37(da) adalah jelas dan patut di tafsir secara literal dan justeru itu tidak timbul keperluan untuk mahkamah ini merujuk kepada ucapan YB Menteri di dalam Parlimen (lihat perenggan 15).

(4) (oleh **Abdul Malek Ahmad PMR**) Seksyen 37(da) Akta tersebut tidak bermula dengan 'sesiapa yang dianggap mempunyai milikan' akan dianggap mengedar, yang mana dalam keadaan sedemikian akan dianggap sebagai akibat s 37(d) Akta tersebut. Sebaliknya, perkataan 'dijumpai' dimasukkan dan dari itu mesti terdapat penemuan mengenai milikan dahulu sebelum anggapan pengedaran boleh timbul. Oleh yang demikian, keputusan didalam *Muhammed bin Hassan* adalah betul (lihat perenggan 43).

(5) (oleh **Abdul Malek Ahmad PMR**) Sebarang keputusan yang dibuat, tanpa keperluan keputusan prospektif, boleh diguna pakai hanya kepada kes-kes yang belum diputuskan tidak kira sama ada pada tahap pertama atau pada tahap rayuan. Ianya tentunya tidak diguna pakai pada kes-kes yang telah diputuskan pada tahap rayuan tertinggi (lihat perenggan 46); *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 tidak diikut.

(6) (oleh **Steve Shim Hakim Besar (Sabah & Sarawak)**) Dalam kes yang sesuai di mana terdapat keterangan yang mencukupi untuk membuktikan milikan sebenar di bawah s 37(da), ianya adalah tidak perlu bagi hakim bicara untuk menggunakan anggapan milikan berkanun di bawah s 37(d). Mahkamah Persekutuan di dalam *Muhammed bin Hassan* tidak mengabaikan kenyataan ini di mana mahkamah mengatakan di dalam kes yang sesuai di mana keterangan mewajarkan, tiada yang menghalang hakim bicara dari memutuskan penemuan fakta milikan (lihat perenggan 69).

(7) (oleh **Steve Shim Hakim Besar (Sabah & Sarawak)**) 'Rukun menentang anggapan berganda' memerlukan hakim bicara membuat pertimbangan yang berasingan di bawah s 37(da) apabila memutuskan sama ada tertuduh mempunyai milikan. Dalam lain perkataan, anggapan milikan di bawah s 37(d) adalah berasingan dan berbeza dari frasa 'dijumpai dalam milikan'

seperti yang di preskripsi oleh s 37(da) Akta tersebut (lihat perenggan 72); *Shariff bin Kadir v Public Prosecutor* [2003] 2 MLJ 203 diikuti. Tiada terdapat asas yang sah untuk mengkaji semula *Muhammed bin Hassan* sebagaimana yang diusulkan oleh pendakwa raya (lihat perenggan 74).

(8) (oleh **Siti Norma Yaakob HMP**) Kajian semula *Muhammed bin Hassan* telah dibuat oleh panel tiga ahli mahkamah ini di dalam *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 dan oleh panel lima ahli di dalam *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259. Dari itu tiada terdapat justifikasi untuk membuat kajian semula lagi (lihat perenggan 90).

(9) (oleh **Siti Norma Yaakob HMP**) Kedua-dua sub-seksyen tersebut adalah peruntukan khas berhubung dengan pematahan anggapan-anggapan yang mempunyai nilai-nilai keterangan di dalam perbicaraan kesalahan-kesalahan yang diperuntukkan di bawah Akta tersebut — dan dari itu ianya tidak berbentuk penal — tetapi jika dilihat secara menyeluruh ianya merupakan sebahagian dari kanun penal, ianya tidak boleh di bantah jika subseksyen tersebut ditafsirkan secara ketat dan ianya tidak patut digunakan melebih dari maksud nyatanya (lihat perenggan 99).

(10) (oleh **Siti Norma Yaakob HMP**) Melainkan jika Parlimen menyatakan dengan jelas kedua-dua subseksyen tersebut hendaklah dibaca bersama, niat Parlimen tidak boleh dipastikan dengan aturan pindaan-pindaan yang dimasukkan di dalam Akta tersebut. Fakta bahawa peruntukan tersebut adalah sub-s (da) yang diikuti secara terus selepas sub-s (d) mungkin disebabkan oleh kemudahan atau seni drafting (lihat perenggan 104).

(11) (oleh **Siti Norma Yaakob HMP**) Terdapat perbezaan yang jelas dalam susun kata dan maksud kedua-dua subseksyen tersebut, dan perbezaan inilah dengan jelas bertentangan dengan dakwaan pendakwa raya yang berpendapat bahawa milikan yang disifatkan di bawah sub-s (d) boleh dibaca dengan sub-s (da) sebagai membuktikan milikan, untuk membangkitkan anggapan mengedar (lihat perenggan 109).

(12) (oleh **Siti Norma Yaakob HMP; Ahmad Fairuz Ketua Hakim Negara** dan **PS Gill HMP** bersetuju) Keputusan mahkamah ini, terutama apabila ia memutuskan untuk menyelesaikan konflik yang berbangkit dari keputusan-keputusan berasingan pada perkara undang-undang, tidak pernah bermaksud untuk ditafsirkan secara retrospektif bagi mengelakkan dari ketidakpastian atau mengganggu asas kontrak dan aturan fiskal yang telah dimasuki. Dari itu, tinjauan kembali hanya boleh berlaku di dalam kes-kes yang belum diputuskan dan bukan dalam kes-kes yang telah diputuskan (lihat perenggan 18, 112 dan 148).

(13) (oleh **PS Gill HMP**) Ianya tidak betul untuk dinyatakan bahawa di dalam *Muhammed bin Hassan* mahkamah telah menggunakan kaedah pentafsiran yang ketat. Sememangnya, ianya adalah jelas bahawa rukun pentafsiran harafiah yang telah digunakan (lihat perenggan 117). Berkenaan dengan

ucapan-ucapan di dalam Hansard, ianya tidak menyebut langsung niat Parlimen berhubung dengan pemakaian anggapan berganda. Selanjutnya, kedua-dua subseksyen tersebut yang mana mahkamah dikehendaki mentafsir, tidak mempunyai sebarang kekaburan (lihat perenggan 120 dan 142).

(14) (oleh **PS Gill** dan **Siti Norma Yaakob HHMP** bersetuju) Berhubung dengan niat Parlimen, pendekatan yang betul adalah untuk memastikan maksud perkataan-perkataan yang digunakan oleh Parlimen dan bukannya niat Parlimen itu sendiri. (lihat perenggan 109 dan 122); *Black-Clawson International Ltd v Papierwerke Ag* [1975] 2 WLR 513 dan *Muhammad bin Hassan* diikuti.

(15) (oleh **PS Gill HMP**) Ianya penting untuk diingatkan bahawa s 4(2) Akta Keterangan 1950 hanya terbatas kepada Akta itu sahaja, dan tidak termasuk kegunaan kepada anggapan-anggapan selain dari yang didapati di dalam Akta Keterangan 1950 (lihat perenggan 127). Oleh yang demikian, perkataan-perkataan 'Akta ini' yang ada di dalam s 4 Akta Keterangan tidak terpakai kepada anggapan-anggapan lain selain dari yang terkandung didalam Akta Keterangan (lihat perenggan 128); *Tun Datu Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (NO 2)* [1986] 2 MLJ 420 diikut.

(16) (oleh **PS Gill HMP**) Perbezaan di antara perkataan 'disifatkan' dan 'dianggap' adalah amat tipis sekali, jika ada (lihat perenggan 138). Malahan, tajuk kepada s 37 Akta tersebut merujuk kepada 'Anggapan-anggapan', dan tiada perbezaan dibuat di dalam Akta tersebut di antara perkataan 'disifatkan' dan 'anggapan'. Oleh yang demikian, ianya jelas bahawa badan perundangan tidak membezakan perkataan 'disifatkan' dan 'anggapan' yang digunakan bertukar ganti di dalam Akta tersebut (lihat perenggan 139).

(17) (oleh **PS Gill HMP**) Mahkamah terpaksa tidak lari dari *Muhammed bin Hassan* kerana beberapa sebab iaitu: (i) ianya tidak patut mentafsirkan niat Parlimen hanya dengan menggunakan maksud perkataan seperti di dalam kamus. Hansard yang mana dapat digunakan sebagai alat bantuan untuk mentafsirkan niat Parlimen adalah tidak berguna di dalam kes semasa (lihat perenggan 142); (ii) penggunaan anggapan-anggapan di bawah s 37(d) dan (da) Akta tersebut secara bersama hendaklah nyata dan jelas dan tidak dapat digunakan secara inferens atau tekaan terutama di dalam prosiding jenayah (lihat perenggan 144); Mahkamah tidak patut mengganggu atau mengambil alih fungsi badan perundangan (lihat perenggan 145); dan ianya merupakan polisi yang tidak bagus bagi mahkamah tertinggi untuk meninggalkan undang-undang dalam keadaan yang tidak jelas dengan menyimpang dari keputusan-keputusan terbaharu (lihat perenggan 146); *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 diikuti.

(18) (oleh **Augustine Paul HMR**, menentang dalam isu pemakaian anggapan berganda) Frasa 'dijumpai dalam milikan' di dalam s 37(da) mestilah ditafsirkan dalam maksud biasa. Satu penemuan adalah dibuat oleh mahkamah selepas menimbang kesemua keterangan yang dikemukakan semasa perbicaraan (lihat perenggan 156). Anggapan undang-undang (seperti s 37(d)) mestilah bangkit secara biasa dalam erti kata 'dijumpai dalam milikan' di dalam s 37(da); oleh itu menjadikan milikan 'disifatkan' termasuk di dalam rangkumannya (lihat perenggan 159).

(19) (oleh **Augustine Paul HMR**) Perkataan 'dibuktikan' dan 'dijumpai' termasuk anggapan kerana tidak terdapat perbezaan yang material di antara kedua-dua konsep tersebut. Kesan penghakiman di *Muhammed bin Hassan* adalah untuk membatasi skop anggapan di bawah s 37(d) (lihat perenggan 160).

(20) (oleh **Augustine Paul HMR**) Seksyen 37 berkenaan berbagai anggapan direka dengan perkataan-perkataan yang jelas untuk diguna pakai di dalam kesemua prosiding di bawah Akta tersebut. Keputusan yang tidak dapat dielakkan adalah s 37(d) tidak terhad pemakaiannya kepada sebarang prosiding di bawah Akta tersebut (lihat perenggan 164). Seksyen 37(d) dengan itu terpakai kepada s 37(da). Akibatnya milikan yang 'disifatkan' di dalam s 37(d) tidak terlepas dari rangkuman s 37(da). Walaupun pendekatan ini menjadikan operasi satu anggapan ke atas satu anggapan yang lain, ianya sah kerana ianya dengan nyata telah dibenarkan secara nyata oleh Parlimen (lihat perenggan 166). Dari itu, maksud biasa frasa 'dijumpai dalam milikan' di s 37(da) tidak terhad walaupun ianya satu melibatkan satu anggapan. Dari itu ianya satu kesimpulan undang-undang bahawa 'disifatkan' milikan di dalam s 37(d) adalah di dalam skopnya (lihat perenggan 167).

(21) (oleh **Augustine Paul HMR**) Anggapan milikan yang timbul dari s 37(d) tidak, pada sendirinya membangkitkan anggapan pengedaran di bawah s 37(da). Keterangan mengenai berat dadah yang terlibat mestilah dikemukakan untuk menggunakan s 37(da) setelah pembuktian milikan di bawah s 37(d). Fakta-fakta asas yang perlu dibuktikan untuk membangkitkan kedua-dua anggapan tersebut adalah berbeza. Oleh kerana anggapan berganda di dalam s 37(d) dan s 37(da) jelas memerlukan fakta-fakta asas yang berbeza untuk dibuktikan, ianya tidak kejam dan menindas dan mestilah wujud walaupun niat Parlimen dalam menciptanya adalah tidak jelas (lihat perenggan 172).]

Notes

For cases on Dangerous Drugs Act 1952 s 37(d), (da), see 4 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 169–184.

For cases on the presumption of drug trafficking, see 7 *Mallal's Dige*st (4th Ed, 2001 Reissue) paras 1840–1843.

For cases on trafficking dangerous drugs, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 112–120.

Cases referred to

Abdillah Bin Labo Khan v Public Prosecutor [2002] 3 MLJ 298 (refd)
Abdul Manap bin Mohamad Hassan v Public Prosecutor [2003] 4 MLJ 374 (refd)
Asharfi Lal v Board of Revenue [1977] AWC 454 (refd)
Black-Clawson International Ltd v Papierwerke Ag [1975] 2 WLR 513 (folld)
Bombay v Bombay Corp AIR 1930 PC 54 (refd)
Chin Choy & Ors v Collector of Stamp Duties [1979] 1 MLJ 69 (refd)
Dalip Bhagwan Singh v Public Prosecutor [1998] 1 MLJ 1 (refd)
Duport Steels Ltd & Ors v Sirs & Ors [1980] 1 WLR 142 (refd)
East End Dwellings Co Ltd v Finsbury Borough Council [1952] AC 109 (refd)
Ganeslal v Board of Revenue, Rajasthan [1966] 16 ILR Raj 577
Hiralal Ratan Lal v The Sales Tax Officer, Section III, Kanpur AIR 1973 SC 1034 (refd)
Lee Lee Cheng (F) v Seow Peng Kwang [1960] MLJ 1 (refd)
Low Kok Wai v Public Prosecutor [1994] 1 SLR 676 (refd)
Madaulal Fakir Chand v Changdeo Sugar Mills AIR 1962 SC 1543 (refd)
Magor & St Mellons Rural District Council v Newport Corp [1952] AC 189 (refd)
Majlis Peguam & Anor v Tan Sri Dato' Mohamed Yusoff Bin Mohamed [1997] 2 MLJ 271 (refd)
Marathaei d/o Sangulullai (Suing On Behalf Of The Estate Of Thangayah Aupulley) & Anor v Syarikat JG Containers (M) Sdn Bhd & Anor [2003] 2 MLJ 337 (refd)
Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385 (refd)
Mohamad Radzi bin Abu Bakar v Public Prosecutor [2002] 3 MLJ 593 (refd)
Moolchard v Moraraj Kumar Jai Singh AIR 1963 Raj 219 (refd)
Muhammed bin Hassan v Public Prosecutor [1998] 2 MLJ 273 (folld)
Nelson Motis v Union of India AIR 1992 SC 1981 (refd)
Ong Ah Chuan v Public Prosecutor [1981] 1 MLJ 64 (refd)
Pt Hazari Lal v Income Tax Officer, Kanpur (1960) 39 ITR 265 (refd)
Public Prosecutor v Dato' Yap Peng [1987] 2 MLJ 311 (not folld)
Shariff bin Kadir v Public Prosecutor [2003] 2 MLJ 203 (refd)
State of Bihar v Hiralal AIR 1960 SC 47 (refd)
State of UP v Tobit AIR 1958 SC 414 (refd)
Sussex Peerage Case (1844) 11 C1 & F 85 (refd)
Tun Datu Haji Mustapha Bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (NO 2) [1986] 2 MLJ 420 (folld)
Tunde Apatira & Ors v Public Prosecutor [2001] 1 MLJ 259 (folld)
Union of India v Jalyan Udyog AIR 1994 SC 88 (refd)
Yeo Peck Chie v KS Gill & Co [1946] MLJ 131 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 37(d), (da), (f), (g), (h), 39A(1)(d), (2), 39B(1)(a), (2)
Evidence Act 1950 ss 3, 4(2)

Income Tax Act 1922 [Ind] ss 2(2), 42, 43
Interpretation Acts 1948 and 1967 s 17A
Misuse of Drugs Act [Sing] ss 17, 18

Mohd Yusof Zainal Abiden (Senior Deputy Public Prosecutor) (Attorney General's Chambers) for the appellant (respondent in cross-appeal) in Criminal Appeals No 05–40 of 2002(W) and No 05–41 of 2002(W).

Gurbachan Singh (Kartar Singh & Amrit Pal Singh with him) (Bachan & Kartar) for the respondent (appellant in cross-appeal) in Criminal Appeals No 05–40 of 2002(W) and No 05 –41 of 2002(W).

Karpal Singh (Jagdeep Singh Deo with him) (Karpal Singh & Co) for the appellant (respondent in cross-appeal) in Criminal Appeals No 05–68 of 2002(P) and No 05–70 of 2002(P).

Shamsul Sulaiman (Deputy Public Prosecutor) (Attorney General's Chambers) for the respondent (appellant in cross-appeal) in Criminal Appeals No 05–68 of 2002(P) and No 05–70 of 2002(P).

Ahmad Fairuz Chief Justice:

[1] Semasa menulis alasan-alasan penghakiman ini, saya berpeluang membaca draf-draf penghakiman YAA Presiden Mahkamah Rayuan, YAA Hakim Besar Sabah & Sarawak dan YA Dato' Augustine Paul HMR. Seperti ditegaskan oleh YA Dato' Augustine Paul di dalam drafnya itu, rayuan-rayuan jenayah dihadapan mahkamah ini melibatkan isu sama ada anggapan pemilikan dibawah s 37(d) Akta Dadah Berbahaya 1952 ('Akta itu') boleh disifatkan sebagai kesaksian (evidence) pemilikan di bawah s 37(da). Mahkamah ini telah menyelesaikan isu itu dengan secara negatif — iaitu anggapan-anggapan itu tidak boleh disifatkan sebagai kesaksian pemilikan. Ini ketara dari kes *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 ('kes *Muhammed bin Hassan*') yang memutuskan isu itu seperti berikut (di ms 287–289):

> In deciding this issue, it is necessary, first and foremost, to bear in mind that both sub-ss (d) and (da) of s 37 of the Act, being penal provisions, must be construed, and must not be extended beyond their clear meaning. …
>
> The wordings of sub-ss (d) and (da) of s 37 are clear and unequivocal. That being so, their meanings must be determined from the language employed and the two subsections must be taken to mean exactly what they respectively say.
>
> …
>
> In our view, there is a clear undeniable distinction between the word 'deemed' used in s 37(d) and the word 'found' employed in s 37(da) of the Act. The 'deemed' state of affairs in s 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody or control. Such presumptions as under s 37(d) (and, for that matter, the one under s 37(da)) are sometimes described

as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s 37(d) by the prosecution), the court *must* in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word 'found' in the opening phrase of s 37(da) connotes a finding after a trial by the court.

Furthermore, the basic or primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s 37(d) of the Act and those required to raise 'presumed ... trafficking' under s 37(da) are different. To come to the presumptions of possession and knowledge under s 37(d), one need only to arrive at a finding of having had 'in custody or under ... control anything whatsoever containing' the drug (as opposed to the drug itself) whereas to arrive at the presumption of 'trafficking' under s 37(da), a finding of being 'in possession' of the drug is necessary (in addition of course, to proof of the relevant minimum quantity specified). In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public prosecutor — a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.

In our view, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

[2] Timbalan Pendakwa Raya menghujahkan bahawa mahkamah ini didalam kes *Muhammed bin Hassan* telah tersilap kerana mengguna pakai kaedah pentafsiran ketat (strict construction rule) dengan menganggap s 37 Akta itu adalah peruntukan penal. Mengikut Timbalan Pendakwa Raya, peruntukan s 37 itu bukanlah peruntukan penal tetapi peruntukan berkaitan keterangan. Untuk menyokong hujahnya Timbalan Pendakwa Raya merujuk kepada *Halsbury's Laws of England* (4th Ed) Vol 44 para 910 yang berbunyi:

A statute must be regarded as penal for purposes of construction if it imposes a fine, penalty or forfeiture, other than a penalty of liquidated damages, or other penalties which are in the nature of civil remedies.

[3] Timbalan Pendakwa Raya seterusnya berhujah bahawa jika pun s 37 dianggap sebagai peruntukan penal, mahkamah ini telah tersalah arah kerana memakai prinsip pentafsiran yang ketat sebagai rukun pentafsiran yang pertama, walhal rukun itu adalah rukun pentafsiran yang terakhir.

[4] Isu kedua yang dibangkitkan oleh Timbalan Pendakwa Raya ialah bahawa adalah niat Parlimen untuk menjadikan pemakaian anggapan s 37(d) sebagai automatik kepada s 37(da). Beliau berhujah bahawa jika niat Parlimen ialah untuk menjadikan pemakaian s 37(d) dan s 37(da) eksklusif di antara satu sama lain, langkah yang sepatutnya diambil ialah menambah peruntukan mengenai anggapan pengedaran sebagai s 37(k). Hakikat bahawa peruntukan mengenai

anggapan pengedaran dimasukkan sebagai perenggan (da) selepas sahaja perenggan (d), menurut Timbalan Pendakwa Raya, adalah menunjukkan niat Parlimen yang tersebut. Timbalan Pendakwa Raya merujuk kepada ucapan YB Menteri yang membentangkan pindaan untuk memasukkan peruntukan s37(da) dan juga kepada s 17 Akta Pentafsiran 1967. Untuk menyokong hujahnya, Timbalan Pendakwa Raya juga merujuk kepada s 3 dan s 4(2) Akta Keterangan 1950 yang masing-masingnya berbunyi:

> 'proved': a fact is said to be 'proved' when, after considering the matters brought before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.
>
> Whenever it is directed by this Act that the court shall presume a fact, it shall regard the fact as proved unless and until it is disproved.

[5] Peruntukan-peruntukan tersebut di atas, menurut Timbalan Pendakwa Raya, tidak membezakan sama ada sesuatu fakta itu dibuktikan melalui keterangan langsung atau anggapan dan oleh yang demikian, mahkamah ini tidak seharusnya menitikberatkan soal bagaimana sesuatu fakta itu dibuktikan. Perkataan-perkataan 'found in possession' ujar Timbalan Pendakwa Raya hendaklah, justeru itu, membawa maksud yang merangkumi juga anggapan pemilikan.

[6] Hujah Timbalan Pendakwa Raya yang seterusnya ialah bahawa mahkamah ini tersalah arah di dalam kes *Muhammed bin Hassan* kerana menyamakan s 37(d) yang merupakan peruntukan disifatkan (deeming provision) dengan s 37(da) iaitu peruntukan anggapan (presumption provision). Kedua-dua peruntukan ini, menurut Timbalan Pendakwa Raya adalah dua peruntukan yang berbeza. Beliau merujuk kepada NS Bindra's *Interpretation of Statutes* (8th Ed) (1997) dims 46 yang berbunyi:

> Where the legislature says that something should be deemed to have been done which in truth has not been done, it creates a legal fiction and in that case the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion.

[7] Meneliti penghakiman mahkamah ini di dalam kes *Muhammed bin Hassan*, jelas kepada saya bahawa kaedah pentafsiran yang dipakai ialah kaedah literal. Ini dapat dilihat daripada penghakiman kes tersebut di ms 288 yang berbunyi:

> Since the literal meanings of the two subsections are intelligible, they must not be extended on the ground that there has been a slip or a matter not provided for which should have been provided for. Any ambiguity or slip would be a matter for the legislature.

[8] Pada pendapat saya pendekatan mahkamah ini di dalam memakai kaedah pentafsiran literal itu adalah tepat. Di dalam kes *Megat Najmuddin bin Dato Seri*

(Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385 di ms 420 saya telah menyatakan persetujuan saya dengan keputusan Mahkamah Agung di India di dalam kes *Hiralal Ratan Lal v The Sales Tax Officer, Section III, Kanpur* AIR 1973 SC 1034 di mana dinyatakan:

> In construing a statutory provision, the first and foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, we need not call into aid the other rules of construction of statutes. The other rules of construction of statutes are called into aid only when the legislative intent is not clear.

[9] Di dalam kes *Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69, mahkamah ini menyatakan di ms 70:

> It may be apposite at this stage to recall certain basic principles in the interpretation of statutes. Applying the words and phrases of a statute in the ordinary meaning has been said to be the first and most elementary rule of construction and the second is said to be to construe the phrases and sentences according to the rules of grammar.

[10] Willan CJ di dalam kes *Yeo Peck Chie v KS Gill & Co* [1946] MLJ 131 dims 133 pula menyatakan:

> In interpreting a provision of a statute, one of the cardinal rules is to adhere as closely as possible to the literal meaning of the words. If an authority is required for this, it is to be found in the case of *Abbott v Middleton* (1858) 7 HL Cas 114. Once the literal meaning has been established then, however unjust, arbitrary or inconvenient such meaning may be, it must receive its full effect: see *Biffin v Yorke* 5 Man & G 428. Nor is it the function of the court to scan the wisdom or policy of a statute: see *May v The Great Western Railway Co* 41 LJQB 104.

[11] Menggunakan kaedah pentafsiran literal kepada perkataan-perkataan di dalam peruntukan s 37(d) dan s 37(da) akan membawa maksud bahawa apabila pihak pendakwa membuktikan seseorang itu mempunyai jagaan atau kawalan ke atas sesuatu yang mengandungi dadah berbahaya, maka anggapan pemilikan akan timbul. Manakala untuk menimbulkan anggapan mengedar dadah berbahaya, seseorang itu mestilah didapati memiliki, bukannya dianggap memiliki dadah berbahaya tersebut.

[12] Mengenai hujah bahawa s 37 tidak memperuntukkan apa-apa denda, penalti, atau perlucuthakkan dan kerana itu bukan peruntukan penal, saya merujuk kepada apa NS Bindra's *Interpretation of Statutes* (9th Ed) kata di ms 328:

> A penal statute has to be construed strictly.
>
> The word penal connotes some form of punishment imposed against the individual by mandate of the State. Where the primary purpose of the statute is expressly enforceable by fine, imprisonment, or other punishment, the statute is always construed as penal.

[13] Ketara, yang relevannya ialah statut penal dan bukan peruntukan penal. Seksyen 37 adalah peruntukan dalam Akta itu yang tidak dinafikan adalah statut penal.

[14] Mengenai hasrat Parlimen yang dikatakan mahu menjadikan pemakaian s37(da) secara automatik berikutan pemakaian s 37(d) saya bersetuju dengan pernyataan penulis di dalam NS Bindra's *Interpretation of Statutes* (9th Ed) di ms 343 bahawa:

> The question for the court is not what the legislature meant, but what the language means, ie, what the Act has said that it meant. The courts must give first precedence to the plain meaning of the language used in the statute and, if the meaning is clear and quite unambiguous, that meaning must be accepted by the courts irrespective of other considerations even though the purpose of the legislature might be defeated by that interpretation. In truth when the meaning of the words is plain, it is not the duty of the courts to busy themselves with supposed intentions. In such cases the words themselves declare the intention of the legislature.

[15] Keputusan mahkamah ini di dalam kes *Muhammed bin Hassan* yang menyatakan kerana peruntukan s 37(d) dan s 37(da) adalah jelas dan patut ditafsir secara literal dan justeru itu tidak timbul keperluan untuk mahkamah ini merujuk kepada ucapan YB Menteri di dalam Parlimen adalah wajar sekali.

[16] Berkenaan hujah Timbalan Pendakwa Raya mengenai perbezaan antara peruntukan disifatkan dan peruntukan anggapan, saya hanya perlu memetik kenyataan dalam NS Bindra's *Interpretation of Statutes* (9th Ed) di bawah tajuk '*Deeming Provision*' di ms 69 yang berbunyi:

> Where the legislature says that 'something should be *deemed* to have been done' which in truth has not been done, it creates a legal fiction

dan di ms 74 di bawah tajuk '*Legal fiction*' yang berbunyi:

> Therefore, in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but the *presumption* of the existence of the state of affairs which in actuality is non-existent.

[17] Berasaskan taakulan dan nas-nas yang tersebut di atas saya bersependapat dengan keputusan mahkamah ini di dalam kes *Muhammed bin Hassan* bahawa anggapan pemilikan di bawah s 37(d) Akta itu tidak boleh disifatkan sebagai kesaksian pemilikan di bawah s 37(da). Alasan-alasan penghakiman mahkamah ini di dalam kes *Muhammed bin Hassan* adalah begitu terperinci dan rasional hinggakan, pada saya, ianya tidak wajar diganggu gugat.

[18] Setelah saya menyelesaikan draf alasan penghakiman saya, saya telah berpeluang membaca draf alasan penghakiman YA Dato' Siti Norma bte Yaakob. Setelah diteliti drafnya itu saya cuma ingin menyentuh mengenai isu penguatkuasaan kebelakangan (retrospective application) keputusan kes *Muhammed bin Hassan*. Saya bersetuju dengan rasional dan pandangan YA Dato' Siti Norma

seperti yang tersebut dalam draf alasan penghakimannya itu — yakni, apa-apa keputusan yang dibuat hanya terpakai kepada kes-kes yang masih menanti perbicaraan.

Abdul Malek Ahmad PCA:

[19] In appeal 05–40 of 2002(W) and cross-appeal 05–41 of 2002(W) ('the first appeal'), the respondent was charged for trafficking in dangerous drugs weighing 74.9g of heroin and monoacetylmorphines under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39B(2) of the Act.

[20] On 11 August 1997, a police party acting on information had taken position in the parking area of Campagna Condominium at Meadow Park 2, Happy Garden, Kuala Lumpur at about 8.30pm when about half an hour later, they saw a Kancil car with registration No WFC 4906 driven by the respondent enter the car park with a woman passenger. The respondent had got out of the car and carrying an orange bag in his right hand, he had entered the lift but had reemerged five minutes later to go back to the car carrying the orange bag when he was arrested by the police party.

[21] In the orange bag was found two packages wrapped in newspaper each having a clear plastic wrapping containing a granular and powdery substance. This was later analysed by the chemist as a mixture of 18.4g of heroin and 56.5g of monoacetylmorphines. His female companion was also detained but subsequently released.

[22] In the relevant parts of his judgment, the learned trial judge said:

> The bag was held in the accused's own hands. It is clear then that he had physical custody and control of the bag. He cannot not know he was holding the bag. Therefore has knowledge of the orange plastic bag. The issue is whether he knew that in the plastic bag he was holding were packages containing the dangerous drugs...
>
> The accused in this case was carrying the bag containing the dangerous drugs. On the one hand, it cannot be denied when a person is carrying a bag, he is in fact also carrying the things contained in the bag. On the other hand, when a person has custody and control of a bag, it does not necessarily mean he has knowledge of the contents of the bag. In such a case he may have possession of the bag but not necessarily the contents
>
> The dangerous drugs heroin and monoacetylmorphines were in a sealed clear plastic bag wrapped simply in newspaper and placed in the bag. The bag was neither sealed nor tied up. The bag is a thin plastic bag. One cannot not know there were paper wrapped packages in the bag. The paper wrapped packages themselves are not sealed. Inside each paper wrapper is a sealed clear plastic bag containing the pink granular and powdery substance. The bag was not tied and sealed in such manner that a carrier cannot know what is really inside. Clearly the bag is not packaged in such a manner as to be carried by a person who is being denied knowledge of its contents, and would be in the case of an innocent carrier. In the absence of

any evidence to the contrary, the manner of packaging in this case would in the common course of human conduct mean that the carrier knows of the contents. The court concludes he knew of the thing or substance he was carrying in the bag.

[23] The respondent was accordingly found guilty as charged and was sentenced to death.

[24] At the Court of Appeal, the charge was amended to possession under s 12(2) of the Act punishable under s 39A(1)(d) of the Act and the sentence was reduced to 15 years' imprisonment from the respondent's date of arrest on 11 August 1997 and with whipping of ten strokes.

[25] The Court of Appeal stated:

Here there was no factual matrix on which the trial judge could have inferred that the accused had knowledge of the nature of the dangerous drugs. All that was proved was that he had control and custody of the bag and the packages of the impure drugs and under s 37(d) the presumption could have been invoked for knowledge of the nature of the drugs. And bearing in mind the Federal Court case of *Muhammed bin Hassan v PP* [1998] 2 MLJ 273 the prosecution cannot and in this case the trial judge could not have relied on the presumption under s 37(d) to presume that the accused was trafficking in the dangerous drugs under s 37(da)(iiia).

At the close of the prosecution case the learned trial judge had relied on actual custody and control of the drugs in the accused and his knowledge of the nature of the dangerous drugs without resort to the presumption of s 37(d) for possession of the drugs in the accused. And we have said there was no factual matrix for him to make the inference of such knowledge. He then invoked the presumption under s 37(da) on the basis of proved possession and we say that no knowledge in the drugs having been proved, there was no possession proved and the invoking of the presumption under s 37(da) was misconceived.

[26] Both the public prosecutor and the appellant filed their appeal and cross appeal respectively but before us, learned counsel for the latter withdrew the cross appeal just before arguments began.

[27] As for the second appeal (05–68 of 2002(P) and 05–70 of 2002(P)), the appellant was charged for trafficking in cannabis weighing 39,105g under s39B(1)(a) of the Act punishable under s 39B(2) of the Act.

[28] The facts here were that a police party had positioned themselves at both the front and back portion of the house under surveillance and when the leader of the police party knocked on the front door, it was opened by the appellant clad in a towel and at the same time, he also saw a woman running towards the bathroom.

[29] A search was conducted and found in the kitchen on the ground floor was a weighing scale, a plastic package containing two rolls of adhesive tape and a package containing empty plastics of different sizes.

[30] When questioned where the drugs were, the appellant replied that they were on the first floor. He then led the police party to the front room upstairs

where the door was ajar and the key was in the keyhole. The appellant pointed to the dressing cupboard and the wall cupboard. In the wall cupboard, the police recovered two plastic bags containing the cannabis as stated in the charge.

[31] The High Court found the appellant guilty of the charge and accordingly sentenced him to death.

[32] In following the *Muhammed bin Hassan* case, the Court of Appeal reduced the charge to possession under s 6 of the Act punishable under s 39A(2) of the Act. The appellant was accordingly sentenced to 18 years imprisonment from the date of arrest on 4 July 1996 and to ten strokes of whipping.

[33] In *Muhammed bin Hassan*, this court made a finding that:

> …to come to the presumptions of possession and knowledge under s 37(d) of the Act, one need only to arrive at a finding of having had 'in custody or under ... control anything whatsoever containing' the drug whereas to arrive at the presumption of 'trafficking' under s 37(da), a finding of being 'in possession' of the drug is necessary. It would therefore be unduly harsh and oppressive to construe the automatic application of presumption upon presumption. Such a construction ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which here is not. Therefore, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder giving rise to the presumption of trafficking, there must be an express affirmative finding, not only a legal presumption, of possession as understood in criminal law, based on evidence. The word 'found' in s 37(d) of the Act must bear the same meaning as the word 'found' in s 37(da) of the Act. Both require evidential materials in attaining proof thereof and are different from the word 'deemed' employed in s 37(d) of the Act. Moreover, to read the presumption of possession provided in s 37(d) into s 37(da) so as to invoke against an accused a further presumption of trafficking would not only be ascribing to the phrase 'found in possession' in s 37(da) a meaning wider than it ordinarily bears but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused. Any ambiguity in s 37(da) should be resolved in favour of the accused by placing the burden of proving possession of the substances involved on the prosecution. The trial judge had therefore erred in law by using the presumption of possession under s 37(d) of the Act to invoke the presumption of trafficking under s 37(da) thereof.

[34] At the outset, learned counsel for the second appeal objected to the seven member panel reviewing the decision in *Muhammed bin Hassan* as it had already been done by a five man Bench in *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259.

[35] There, the main argument of the appellants rested on the complaint that the approach adopted by the trial court and the Court of Appeal ran contrary to the decision of the court in *Muhammed bin Hassan*. The appellants there had complained that both courts below had resorted to the presumption under s 37(da) of the Act after invoking the presumption under s 37(d) thereof. However, the learned deputy public prosecutor argued that even if the direction

in *Muhammed bin Hassan* was not applied in that case, it makes no difference to the final result of the case.

[36] In that case, this court said:

> The learned deputy provided two responses to the appellants' submissions. He first submits that *Muhammed bin Hassan* was wrongly decided and ought no longer to be followed. His second submission is that even if this court correctly interpreted s37(da) of the Act in *Muhammed bin Hassan*, the failure of the courts below in the present case to adhere to that interpretation occasioned no miscarriage of justice to the appellants before us.
>
> With respect, we are unable to accept the learned deputy's invitation to depart from *Muhammed bin Hassan* for three reasons. In the first place, *Muhammed bin Hassan* is a very recent decision of this court. It is bad policy for us as the apex court to leave the law in a state of uncertainty by departing from our recent decisions. Members of the public must be allowed to arrange their affairs so that they keep well within the framework of the law. They can hardly do this if the judiciary keeps changing its stance upon the same issue between brief intervals. The point assumes greater importance in the field of criminal law where a breach may result in the deprivation of life or liberty or in the imposition of other serious penalties. Of course, if a decision were plainly wrong, it would cause as much injustice if we were to leave it unreversed merely on the ground that it was recently decided. In a case as the present this court will normally follow the approach adopted by the apex courts of other Commonwealth jurisdictions as exemplified by such decisions as *R v Shivpuri* [1986] 2 All ER 334.
>
> The second reason is closely connected to the first. It also has to do with certainty in the law. The decision in *Muhammed bin Hassan* has been affirmed by our courts (see *PP v Ong Cheng Heong* [1998] 6 MLJ 678) and convictions have been quashed by this court acting on its strength. See, for example *Haryadi Dadeh v PP* [2000] 4 MLJ 71. If we accept the learned deputy's invitation to depart from *Muhammed bin Hassan*, it will throw the law into a state of uncertainty and cast doubt on the accuracy of the pronouncements made in those cases that have so recently applied the interpretation formulated in that case. It is bad policy for us to keep the law in such a state of flux especially upon a question of interpretation of a statutory provision that comes up so often for consideration before the court.
>
> Lastly — and this is the most important reason — we agree with the interpretation placed by the learned Chief Judge of Sabah and Sarawak on s 37(da) of the Act. The logic and reasoning for interpreting that subsection in the way in which it was done in *Muhammed bin Hassan* appear sufficiently from the judgment in that case. It requires no repetition. All we need say is that para (da) of s 37 is differently constructed from para (d) of that section and must therefore carry an (sic) different meaning. As the Act is a penal statute, any ambiguity in language should be resolved in an accused's favour: *Sweet v Parsley* [1970] AC 132.
>
> For the foregoing reasons, we reject the argument of the respondent to the effect that *Muhammed bin Hassan* was wrongly decided and ought no longer to be applied.

The alternative submission of the learned deputy is that even if the direction in *Muhammed bin Hassan* was not applied in the present case, it makes no difference to the final result. This is a far more formidable argument.

[37] Learned counsel also referred to *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 where this court, in dealing with the issue of whether an earlier or later decision of this court should be followed, said:

> In our local context, the Federal Court is to be substituted for the House of Lords with regard to the matter under discussion.
>
> In this connection, it is interesting to refer to *Cassell & Co v Broome* [1972] AC 1027 at p 1054. It was held that courts in the lower tiers below the Court of Appeal could not rely on the per incuriam rule applied by the Court of Appeal for itself, but could choose between two conflicting decisions. We may add that they may so choose, whatever the dates of the conflicting decisions, as such dates do not matter to the Court of Appeal itself.
>
> The rule of judicial precedent in relation to the House of Lords was stated in *London Tramways v London County* (1898) AC 375 that it was bound by its own previous decision in the interests of finality and certainty of the law, but a previous decision could be questioned by the House when it conflicted with another decision of the House or when it was made per incuriam, and that the correction of error was normally dependent on the legislative process.
>
> However, in 1966, Lord Gardiner LC made the following statement on behalf of himself and all the Lords of Appeal in Ordinary commonly known as the *Practice Statement (Judicial Precedent)* 1966 which is set out below:
>
> > Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individual can rely in the conduct of their affairs, as well as a basis for orderly development or legal rules.
> >
> > Their Lordship nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
> >
> > In this connection, they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especially need for certainty as to the criminal law.
> >
> > This announcement is not intended to affect the use of precedent elsewhere than in this House.
>
> Experience in the United Kingdom has shown that the power 'to depart from a previous decision when it appears right to do so' has been used very sparingly.
>
> In Malaysia, the Federal Court and its forerunner, ie the Supreme Court, after all appeals to the Privy Council were abolished, has never refused to depart from its

own decision when it appeared right to do so: see the above-mentioned Federal Court's cases on the question of burden of proof at the close the prosecution's case.

Though the *Practice Statement (Judicial Precedent) 1966*, of the House of Lords is not binding at all on us, it has indeed and in practice been followed, though such power to depart from its own previous decision has been exercised sparingly also. It is right that we in the Federal Court should have this power to do so but it is suggested that it should be used very sparingly on the important reason of the consequences of such overruling involved for it cannot be lost on the mind of anybody that a lot of people have regulated their affairs in reliance on a *ratio decidendi* before it is overruled. In certain circumstances, it would be far more prudent to call for legislative intervention. On the other hand, the power to do so depart is indicated (subject to a concurrent consideration of the question of the consequences), when a former decision which is sought to be overruled is wrong, uncertain, unjust or outmoded or obsolete in the modern conditions.

In this connection, the question of a 'full court' or a panel of Federal Court comprising more than three members as compared with the ordinarily constituted coram of three members of the same court, arises for consideration. In view of the reasons about departing from its previous decisions advanced above, the effect or weight of a decision of a 'full court' and that of an ordinary coram is the same by necessary implication. A full court or a panel larger than the ordinary coram is usually indicated such as when an unusually difficult or controversial question of law is involved, or a question arises as to whether a previous decision of the Federal Court ought to be overruled.

If the House of Lords, and by anology, the Federal Court, departs from its previous decision when it is right to do so in the circumstances set out above, then also by necessary implication, its decision represents the present state of the law. When two decisions of the Federal Court conflict on a point of law, the later decision therefore, for the same reasons, prevails over the earlier decision.

[38] The contention of the learned deputy was that they were not asking for a review nor the bigger coram but was in fact coming in with new arguments not raised before.

[39] On that basis, we decided to proceed with the two appeals and reexamine the decision in *Muhammed bin Hassan*.

[40] Let us revert to the finding in *Muhammed bin Hassan* where the judgment states at pp 287–289 as follows:

In deciding this issue, it is necessary, first and foremost, to bear in mind that both sub-ss (d) and (da) of s 37 of the Act, being penal provisions, must be strictly construed, and must not be extended beyond their clear meaning. *Liew Sai Wan v PP* [1968] 2 MLJ 1 (PC); *PP v Leong Kuai Hong* [1961] 1 MLJ 246. See also *Stenhenson v Higginson* (1851) 3 HL Cas 638 where Lord Truro observed (at p 686):

> ...but in a penal enactment, where you depart from the ordinary meaning of the words used, the intention of the Legislature that those words should be understood in a more large or popular sense, must plainly appear.

A And, in *R v Cuthbertson* [1980] 2 All ER 401 where a forfeiture provisions in the Misuse of Drugs Act 1971 (English) was called for construction, Lord Diplock observed (at p 404):

> The fact that the section is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than that they would ordinarily bear.

B

The wordings of sub-ss (d) and (da) of s 37 are clear and unequivocal. That being so, their meanings must be determined from the language employed and the two subsections must be taken to mean exactly what they respectively say. Also, generally speaking, if the words in a statute admit of two interpretations, then they are not clear, and if one interpretation is more favourable to an accused than the other, the court will adopt the one more favourable to the accused.

C

Since the literal meanings of the two subsections are intelligible, they must not be extended on the ground that there has been a slip or a matter not provided for which should have been provided for. Any ambiguity or slip would be a matter for the Legislature. In *Magor and St Mellons Rural District Council v Newport Corp* [1952] AC 189 Lord Simonds observed (at p 191):

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> The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited ... if a gap is disclosed, the remedy lies in an amending Act.

E

In our view, there is a clear undeniable distinction between the word 'deemed' used in s 37(d) and the word 'found' employed in s 37(da) of the Act. The 'deemed' state of affairs in s 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody or control. Such presumptions as under s 37(d) (and, for that matter, the one under s 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word 'found' in the opening phrase of s 37(da) connotes a finding after a trial by the court.

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G

H Furthermore, the basic or primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s 37(d) of the Act and those required to raise 'presumed ... trafficking' under s 37(da) are different. To come to the presumptions of possession and knowledge under s 37(d), one need only to arrive at a finding of having had 'in custody or under ... control anything whatsoever containing' the drug (as opposed to the drug itself) whereas to arrive at the presumption of 'trafficking' under s 37(da), a finding of being 'in possession' of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified). In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of

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presumption upon presumption as contended by the learned deputy public prosecutor — a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion is not.

[41] It was the view of the learned deputy in the second appeal that since s37(da) of the Act was added in only in 1977, it should have been numbered as s 37(k) of the Act instead of being placed immediately after s 37(d) of the Act if the intention was for them not to be read in tandem. To my mind, it was more because of the contents of s 37(d) and s 37(da) of the Act themselves that it became more appropriate to place them one after the other. As for the need to read in tandem, it is my view that all the paras in s 37 of the Act have to be read in tandem irrespective of their placing.

[42] Now, what does s 37(d) of the Act say? Any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of that drug and shall, until the contrary is proved, be deemed to have known the nature of such drug. If he has custody or control, he is deemed to be in possession and deemed to know the nature of the drug.

[43] As for s 37(da) of the Act, it does not start with 'any person who is deemed in possession' shall be presumed to be trafficking, in which case it will be considered a consequence of s 37(d) of the Act. Instead, the word 'found' is inserted and so there must be a finding of possession first before the presumption of trafficking comes about. It is, therefore, my considered opinion that the decision in *Muhammed bin Hassan* is correct.

[44] The next question to consider is whether the decision in *Muhammed bin Hassan* is retrospective. In *Abdillah Bin Labo Khan v Public Prosecutor* [2002] 3 MLJ 298, the Court of Appeal held as follows:

The Federal Court could, therefore, if it had so wished, have declared its decision in *Muhammed bin Hassan* to be of prospective effect only. Had it done so, then cases decided under the former misconception about the way in which ss 37(d) and (da) of the Act were to be applied would not have been available for correction on appeal. But that is not what happened. The decision in *Muhammed bin Hassan* consequently falls under the general doctrine of retrospectivity and it therefore applies to the present case. We therefore are bound to apply it.

[45] This issue had actually been made clear by the Supreme Court in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 when it said:

The general principle of retroactivity of a judicial declaration of invalidity of a law was overturned by the Supreme Court of the United States of America in *Linkletter v Walker* (1965) 381 US 618 (at p 628) when it devised the doctrine of prospective overruling in the constitutional sphere in 1965 as a practical solution for alleviating the inconveniences which would result from its decision declaring a law to be unconstitutional, after overruling its previous decision upholding its constitutionality.

This doctrine was applied by the Supreme Court of India in LC Golak Nath v State of Punjab & Anor AIR 1967 SC 1643 (at pp 1666–1669). The doctrine — to the effect that when a statute is held to be unconstitutional, after overruling a longstanding current of decisions to the contrary, the court will not give retrospective effect to the declaration of unconstitutionally so as to set aside proceedings of convictions or acquittals which had taken place under that statute prior to the date of the judgment which declared it to be unconstitutional, and convictions or acquittals secured as a result of the application of the impugned statute previously will accordingly not be disturbed — can be applied by the Supreme Court as the highest court of the country in a matter arising under the constitution to give such retroactive effect to its decision as it thinks fit to be moulded in accordance with the justice of the cause or matter before it — to be adhibited however with circumspection and as an exceptional measure in the light of the circumstances under consideration.

In England this doctrine has been recognised by the House of Lords by necessary implication in the *Practice Statement* (Judicial Precedent) [1966] 1 WLR 1234 issued by Lord Gardiner LC on behalf of himself and the Lords of Appeal in Ordinary on 26 July 1996. More recently, in *Jones v Secretary of State for Social Services* [1972] AC 944, two judges of the House of Lords, Lord Diplock (at p 1015) and Lord Simon of Glaisdale (at p 1026) were prepared to consider the application of the American doctrine of prospective overruling to England. In *Choice Investments Ltd v Jeromnimon* [1981] 2 WLR 80 Lord Denning MR in his judgment in the English Court of Appeal (at p 84) accepted the subsistence and application of the doctrine. In *Defrenne v Sabena* [1981] 1 All ER 122, the Court of Justice of the European Communities applied the doctrine of prospective overruling predicated on conditions of legal certainty which required the court, as an exceptional measure, to declare the law for the future only.

At the conclusion of argument on 19 March 1987, the court accordingly by a majority (Tun Mohamad Salleh Abas LP, and Tan Sri Hashim Yeop A Sani SCJ dissenting) declared s 418A to be unconstitutional and void as being an infringement of the provisions of art 121(1) and applied the doctrine of prospective overruling so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions or acquittals which had taken place under that section prior to the date of our judgment in this matter would remain undisturbed and not be affected, and the appeal was dismissed on this basis.

[46] The principle enunciated in *Public Prosecutor v Dato' Yap Peng* seems to indicate that, unless there is a prospective ruling, any decision will also affect all cases disposed of before that decision. To my mind, the correct proposition would be that any decision made, without the necessity of a prospective ruling, can apply only to pending cases irrespective of whether at first instance or at the appellate stage. It certainly does not apply to cases already disposed of at the highest appellate level.

Steve Shim CJ (Sabah & Sarawak):

[47] The public prosecutor has lodged appeals involving two cases. The background facts of those cases have been sufficiently set out by my learned

brother Abdul Malek Ahmad PCA. As such, I find it unnecessary to restate them here. In any event, they are of no great moment since the appeals turn upon a common issue of law relating to the construction of s 37(d)(a) Dangerous Drugs Act 1952 ('the Act'). More specifically, it involves the question of whether the presumption of trafficking under s 37(da) of the Act can arise out of a presumption of possession under s 37(d) thereof. Hitherto, the Federal Court in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273, has answered the question in the negative, thereby establishing what has been described as 'the rule against double presumption'. The learned deputy public prosecutors have sought to persuade us that the construction adopted by the Federal Court in that case is fundamentally flawed. In effect, they are seeking a revisitation of the decision in *Muhammed bin Hassan*.

[48] At the outset, let me say that I have taken the opportunity of reading and re-reading the judgment of the Federal Court in *Muhammed bin Hassan*. It is a lengthy and exhaustive judgment. On a thorough perusal of *Muhammed bin Hassan*, it seems clear to me that the one significant feature which underpins the whole decision is the need for consistency, clarity and predictability in construing the provisions of s 37(d) and (da) of the Act in the light of the clear and unequivocal words used therein. Without indulging in rhetorics it is, I think, simple enough to examine them along well recognized principles of construction of statutes. That is precisely what the Federal Court in *Muhammed bin Hassan* has done. Therein, the Federal Court said this:

> The wordings in ss (d) and (da) of s 37 are clear and unequivocal. That being so, their meanings must be determined from the language employed and the two subsections must be taken to mean exactly what they respectively say. Since the literal meanings of the two subsections are intelligible, they must not be extended on the ground that there has been a slip or a matter not provided for which should have been provided for. Any ambiguity or slip would be a matter for the Legislature.

[49] The court then cited with approval the observation by Lord Simonds in *Magor & St Mellons Rural District Council v Newport Corp* [1952] AC 189 (HL) wherein he said that the duty of the court was to interpret the words of a statute that the legislature had used. It is of course trite law that if the intention of the legislature is expressed in words which are clear and explicit, the court must give expression to that intention. As Bindra's *Interepretation of Statutes* (8th Ed), has stated:

> If the intention of the Legislature can be ascertained, all rules of construction must yield to the Legislative intention (*Board of Trustees v Johan Steele* [1933] SCR 47). They cannot override the legislative intent specifically expressed in the enactment (*State Of UP v Jaipal Singh Narsh* [1978] All LI 936). If the intention of the Legislature is clear, that intention constitutes the law.

[50] The primary duty of the court is to give effect to the intention of the legislature in the words used by it. It is a well established canon of interpretation

A that the intent of the legislature is to be gathered from the words used and that if the words used have not acquired any technical meaning, they should be deemed to have been used in their ordinary meaning. If the words of the statute are in themselves precise and unambiguous, then no more is necessary than to expound those words in their natural and ordinary sense. The words B themselves alone in such cases best declare the intent of the law giver (see Bindra's *Interpretation Of Statutes* (8th Ed)).

[51] It is in the wake of these principles that the provisions in s 37(d) and (da) of the Act have to be construed. Now, s 37(d) and (da) are couched as follows:

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> (d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;
>
> D
>
> (da) any person found in possession of:
>
> (vi) 200g or more in weight of cannabis…
>
> otherwise than in accordance with the authority of this Act or any written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

E **[52]** It is clear that under s 37(d), a person shall be presumed or deemed to have possession and knowledge of dangerous drugs, unless the contrary is proved, once that person is 'found to have had in custody or under his control anything whatsoever containing' such drugs. The presumptions of possession and knowledge are obviously based or premised on primary or basic facts based F on evidence. There exists a rebuttable presumption of law both of possession and knowledge of dangerous drugs consequent upon the establishment or proof of the basic or primary facts relating to custody or control of anything containing such drugs. It is equally clear that the proof of such basic or primary facts is arrived at by way of evidence. It is not based or derived from statutory G presumptions. This is evident upon a mere perusal of the words 'found to have had in custody or under his control' in s 37(d). Indeed, decided cases dealing with the subsection have shown that proof of custody or control giving rise to the presumptions of possession and knowledge have to be established by evidence, whether direct and/or circumstantial. No question of H statutory presumption arises. Of course, inferences drawn from direct and/or circumstantial evidence can be made in appropriate cases. But inferences are quite distinct from statutory presumptions.

[53] In *Muhammed bin Hassan*, the Federal Court takes the approach that under s 37(da), in order to invoke the presumption of trafficking, it is necessary to I establish or prove the basic or primary facts giving rise to that presumption. Importantly, those basic or primary facts have to be established or proved by way of evidence. They are not established by way of statutory presumption

under s 37(d). In the words of the Federal Court in *Muhammed bin Hassan* there must have been 'an express affirmative finding based on evidence'. The presumption of trafficking is predicated upon 'proved possession' under s 37(da) rather than 'deemed possession' under s 37(d) of the Act. If it was the intention of Parliament to encompass 'deemed possession' therein, explicit words indicating a clear connection with s 37(d) would have been used. As my learned brother Abdul Malek Ahmad PCA has rightly stated, s 37(da) does not commence with the words 'any person who is deemed in possession'. Instead, the words 'found in possession' are used. That observation, in my view, speaks volumes about the intention of Parliament.

[54] As I said earlier, the Federal Court in *Muhammed bin Hassan* has found it necessary to take a consistent approach in construing the word 'found' appearing in s 37(d) and (da) respectively. This is reflected in the following passage of the judgment:

> Having considered the submissions of counsel and the learned deputy public prosecutor, and the law applicable including the rules of construction of penal statutes, we were of the view that the word 'found' in s 37(d) must bear the same meaning as the word 'found' in s 37(da). Both require evidential materials in attaining proof thereof and are vastly different from the word 'deemed' employed in s 37(d).

[55] Here, the Federal Court takes the position that the word 'found' in both sub-ss (d) and (da) of s 37 must be construed to bear the same meaning. Such a consistent approach to construction avoids unpredictability and uncertainty in the law. It provides for clarity of scope and purpose. Given the same word 'found' used in the subsections aforesaid, the Federal Court has stated that they both require 'evidential materials' to be established. By 'evidential materials' the Federal Court must be taken to mean direct and/or circumstantial evidence or inferences arising therefrom. Clearly therefore, the word 'found' connotes proof by way of evidence. Such evidence is a pre-requisite in establishing the basic or primary facts giving rise to the statutory presumptions therein.

[56] In this connection, it is perhaps significant to draw attention to the following passage in *Muhammed bin Hassan* which states:

> A comparison of s 37(da) of our Dangerous Drugs Act 1952, and s 17 of the Singapore Act as on 6 November 1991 will reveal that in both cases to invoke the presumption of trafficking, the element of possession (to the minimum quantities as respectively stated therein) must first be proved or found. And, it is convenient to state here, in answer to the submission of the learned deputy public prosecutor, that, for the purpose of the present issue in question, there is, in our opinion, no material difference between the words 'proved to have had in possession' and the words 'found in possession' used in the respective sections of the two Acts. Both necessitate a finding or proof of possession beyond reasonable doubt based on evidence.

[57] In my view, the Federal Court has taken a perfectly reasonable and rational approach in holding that there is no material difference between the

words 'proved to have had in possession' in s 17 of the Singapore Misuse of Drugs Act and the words 'found in possession' in s 37(da) of our Act. Given the stand taken, the word 'proved' assumes an important role. Under Evidence Act 1950 s 3, the word 'proved' is defined as follows:

> A fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

[58] The definition above makes no distinction between direct and circumstantial evidence. In the ordinary course of events, the word 'proved' requires the production of evidence whether such evidence be direct and/or circumstantial or inferences arising therefrom. By direct evidence is meant when the principal fact or *factum probandum* is attested directly by witnesses, things or documents. And circumstantial evidence means the evidence afforded not by the direct testimony of any eye-witness to the fact to be proved, but by the bearing upon that fact or other and subsidiary facts which are relied upon as inconsistent with any result other than the truth of the principal fact. In short, circumstantial evidence means a fact on which an inference is to be founded. It is something from which facts in issue are to be inferred (see *Phipson On Evidence* (15th Ed) pp 62–63).

[59] At this juncture, it may be appropriate to say something about presumptions. There are basically two types of presumptions: presumptions of law and presumptions of fact. Presumptions of law can be classified into rebuttable presumptions of law and irrebuttable presumptions of law. In my view, the presumptions in s 37(d) and (da) are in the nature of rebuttable presumptions of law. Where a rebuttable presumption of law applies in favour of a party, on proof or admission of one fact, another fact is to be presumed. Once that presumption applies, the persuasive or evidential burden (as the case may be) is on the other party to disprove the presumed fact (see *Phipson On Evidence* (15th Ed)). Generally, a presumption is an inference of fact drawn from other known or proved facts.

[60] Quite obviously, there is a clear distinction between 'proved' and 'presumed'. Here, I find the Singapore case of *Low Kok Wai v Public Prosecutor* [1994] 1 SLR 676 to be somewhat instructive. It is a decision of the Court of Criminal Appeal. There the facts are these: the appellant was arrested and charged with trafficking in three packets of substance containing over 29.62 gm of diamorphine. The packets were found in the boot of his car. A packet of granular substance containing diamorphine was found in his wallet together with some cash. On searching his home, narcotic officers found a white envelope containing some incriminating items. A number of grounds were advanced at the appeal one of which was that there had been insufficient evidence of possession and the trial judge had wrongfully held that the presumption of trafficking could arise when possession had only been presumed and not proved. In addressing this point, the court said as follows:

Counsel for the accused contended that it was wrong for the court below to apply s 17 to the present case where the fact of possession was not proved but presumed. For a better appreciation of the point in issue, we will set out s 17 as it stood before 15 February 1990 as well as on the date of the offence, so that the difference may be seen. We should, at this juncture, add that that same provision has, since the conclusion of the hearing of this appeal, been further amended. This further amendment came into operation on 10 December 1993, but it does not affect any offence committed before that date.

Before 15 February 1990:

> 17Any person who is proved or presumed to have had in his possession more than:
>
> (c) 2 grammes of diamorphine (heroin) contained in any controlled drug,
>
> shall until the contrary is proved be presumed to have had the controlled drug in his possession for the purpose of trafficking therein.

On 6 November 1991:

> 17Any person who is proved to have had in his possession more than:
>
> (c) 2 grammes of diamorphine;
>
> whether or not contained in any substance, extract, preparation or mixture shall, until the contrary is proved, be presumed to traffic in that controlled drug.

It would be noted that the later version omitted the words 'or presumed'. The later version merely provided that anyone who was proved to have in his possession the specified amount of drug was presumed to traffic in that drug.

The judicial commissioner did not think that the omission of the words 'or presumed' in the later version of the section was significant. He felt that the words 'any person who is proved to have had in his possession' in the section did not preclude the prosecution from relying on the presumption in s 17 even in a case where possession of the drug itself was presumed under s 18. This was how he reasoned:

> In *Lamplough* (1878) 3 Ex D 214, the Court of Appeal in England held that when a statute is amended, the words that remain in the amended statute are deemed to be used in the same sense as in the previous statute. According to this analysis, 'proved' in the amended s 17 would have the same meaning as 'proved' in s 17 prior to the amendment. If that were to be so, then it would follow that it would not include the use of the word 'presumed', that is, the application of the presumption found in s 18. In my view, this should not be the position. It must be noted that the Legislative intention behind the amendment in s 17 was to obviate the effect of *Poon Soh Har*. If, as defence counsel argues, under the amended s 17 there can be no recourse to s 18, the effect of the amendment would be that the prosecution's burden under s 17 would be far more onerous. It must be noted that the presumptions that arise under ss 17 and 18 are rebuttable. I should also point out that, in a case such as this, the burden on the defence to rebut the

presumptions is not high. What is required is merely the introduction of some doubt into the prosecution's case on a balance of probabilities. In my opinion, to give effect to legislative intention, and further, to read the sections as such so as not to render s 18 ineffectual, the conclusion must be that 'proved' in the amended s 17 must also include proof by way of the statutory presumption found in s 18.

With respect, we are unable to agree with the Judicial Commissioner. It seems clear to us that in the Act 'proof' is different from 'presumption'. This is apparent from s 18. Subsection (1) of s 18 provides that 'any person who is proved' to have had in his possession any keys of anything containing a controlled drug shall be presumed to have had that drug in his possession. Subsection (2) of s 18 provides that 'any person who is proved or presumed' to have had a controlled drug in his possession shall be presumed to have known the nature of that drug.

The earlier version of s 17 (pre-15 February 1990) included the words 'or presumed'. By omitting those two words in the later version, Parliament must have intended that the presumption of trafficking in s 17 was only to apply where a person was proved to be in possession of a controlled drug and not merely presumed to be in possession of a controlled drug. If Parliament had intended s 17 to also apply to the situation of 'presumed' possession, then it would not have deleted those two words. It is a rule of construction that a word in a statute must bear the same meaning unless the context clearly otherwise requires. The word 'proved' must bear the same meaning in s 17 as in s 18.

[61] This case clearly draws out the distinction between 'proof' and 'presumption' under the relevant ss 17 and 18 of the Singapore Misuse of Drugs Act. It held that Parliament had intended the presumption of trafficking in s 17 to apply only in a situation where a person was proved to be in possession of the controlled drugs and not merely presumed to be in possession of such drugs. It applied the well established rule of construction that a material word in a statute must bear the same meaning unless the context otherwise requires. In so doing, it had construed the word 'proved' in ss 17 and 18 to bear the same meaning.

[62] Not surprisingly the rationale adopted in *Low Kok Wai* has, to some extent, found favour with the Federal Court in *Muhammed bin Hassan*. In measured tones, it states as follows:

In coming to the above conclusion, we were fully aware of the distinguishing feature in the amendment to s 17 of the Singapore Act by the deletion of the words 'or presumed' which our s 37(da) did not experience because the two quoted words were never part of our said subsection. However, we wish to make clear that our conclusion rested not on the legislative amendment and the case law of Singapore dealt with earlier which were no more than mere persuasive reasoning and were being used merely for illustration, but rather on the general principles of construction of statutes including that penal enactments are to be construed strictly and that words in a statute that are plain and unambiguous are to be given their plain, ordinary and common usage meaning.

[63] Now, the learned deputy public prosecutor has contended that in construing s 37(da) in the manner which *Muhammed bin Hassan* has done, the Federal Court has forsaken the underlying purpose or object of the Act, relying on the speech by the deputy minister of law Tuan Rais Yatim when tabling the amendment to s 37(da), the relevant part of which states:

> Maksud Rang Undang-Undang ini ialah untuk mengadakan peruntukan supaya memiliki heroin atau morphine seberat yang ditetapkan atau lebih dianggap sebagai 'trafficking'.

[64] In this regard, he has drawn attention to s 17A Interpretation Acts 1948 and 1967 which stipulates that in the interpretation of the provision of an Act, a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose. In *Muhammed bin Hassan*, the Federal Court has considered the impact of the speech of the said deputy minister as reported in Hansard. This is reflected in the following passage of the judgment:

> Respecting the Hansard quoted above and relied on by the learned deputy public prosecutor, it sought to introduce into the Act the provision of presumption of trafficking which might be invoked upon proof of possession of certain quantities or above of various types of the dangerous drugs, unless the contrary is proved. The original form of the present s 37(da) first enacted by way of the Dangerous Drugs (Amendment) (No 2) Act 1977 (which was subsequently further amended), was the result of that legislative effort. However, with respect, for the purpose of the present issue under consideration, we were unable to find any assistance from the quoted statement of the then Deputy Minister of Law; but even if there was, we were unable to refer to or rely on it since the two subsections which we were called upon to construe, suffer no ambiguity or obscurity.

[65] Quite clearly the Federal Court has not found the speech of the said deputy minister to be of much assistance as the words sought to be construed in s 37(da) suffer no ambiguity or obscurity. Implicitly, this would mean that the words are to be construed according to well-established principles. In adopting this approach, the Federal Court in *Muhammad bin Hassan* has not, in my view, lost sight of the main objective of the Act, that is, to prevent and/or eradicate drug abuses including drug trafficking. The following observation of the Federal Court reinforces the point:

> We would further add that in so construing as we do, we see no injustice to the prosecution. In a proper case where the evidence so warrants and the amount of the dangerous drug reaches or exceeds the quantity specified in s 37(da), there is nothing to prevent a trial court from coming to a factual finding of possession as understood in criminal law, thereby attracting the presumption of trafficking under the said s 37(da) which, of course, is rebuttable.

[66] The observation of the Federal Court is perfectly tenable given the fact that there were cases where the fact of possession of dangerous or controlled drugs under s 37(da) was established by evidence without the need to resort

to the statutory presumption under s 37(d). For the purpose, it is sufficient to refer to three such cases. But first, it is appropriate I think, to draw attention to the sentiment expressed by Lord Diplock in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 when he said at p 69:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in a case of an accused caught in the act of conveying from one place to another controlled drugs of a quantity much larger than is likely to be needed for his own consumption, the inference that he was transporting them for the purpose of trafficking in them, would, in the absence of any plausible explanation by him, be irresistible even if there were no statutory presumption such as contained in s 15 of the Drugs Act.
>
> As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them.

[67] The illustration provided by Lord Diplock where an accused was caught red-handed with large quantities of controlled drugs in his possession, an irresistible inference could be drawn that he was trafficking in those drugs, demonstrates the proposition that evidence, whether direct, circumstantial or inferential, can be suitably adduced to establish the basic or primary facts giving rise to the presumption of trafficking under s 37(da) of the Act. As can be seen in a number of cases which appear hereafter, the court had not found it necessary to read the statutory presumption of possession under s 37(d) into s 37(da).

[68] Let me begin with the Court of Appeal case of *Abdul Manap bin Mohamad Hassan v Public Prosecutor* [2003] 4 MLJ 374. There, the court made a significant observation. After referring to *Muhammed Hassan*, the court said *inter alia*:

> Our observation of the above judgment makes it clear that where there was evidence of actual possession, the trial judge should make a positive finding that there was actual possession of the drug by the accused person and he should not invoke the presumption under s 37(d) of the Act. If a trial judge invoke s 37(d) of the Act to establish possession even though there was evidence of actual possession and then went on to invoke s 37(da) to establish trafficking, it would be a serious misdirection. We would like to stress this point because time and again, DPPs in their submissions before us have requested this court to look into the totality of the evidence to establish actual possession even though the learned trial judges in their judgments invoked the presumptions under s 37(d) to establish possession and s 37(da) to establish trafficking. Following the decision of *Haryadi bin Dadeh v PP* [2000] 3 AMR 3396, the Federal Court makes it very clear that even though there is evidence of actual possession on the part of an accused person, and despite that the learned judge invokes s 37(d) to establish possession and then goes on to invoke the presumption under s 37(da) to establish trafficking the learned judge

had misdirected himself and in such a situation an accused person should be given the benefit of the doubt. The accused person should be found guilty of the offence of possession only.

[69] In my view, that observation is eminently sound. I agree that in an appropriate case where there is sufficient or ample evidence to establish actual possession under s 37(da) there would be no necessity for a trial judge to invoke the statutory presumption of possession under s 37(d). The Federal Court in *Muhammed bin Hassan* has not lost sight of this proposition as reflected in that part of its judgment cited a moment ago wherein the court stated that in a proper case where the evidence so warranted, there was nothing to prevent the trial judge from coming to a factual finding of possession.

[70] I turn next to the case of *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259v where, on the facts established in evidence before the High Court, the Federal Court held that actual possession of dangerous drugs could and should have been invoked. The following passage in the judgment vindicates this point:

There is no dispute about the central facts relating to the possession of the drugs. It was established by the evidence and accepted by the learned judge that the drugs in question were found in packets within the stomachs of the appellants. Each appellant had swallowed a packet containing the drug. The learned trial judge found the appellants' version of how they had come to swallow the drugs in question as being implausible. The totality of the evidence reasonably supports the conclusion that the appellants were in actual possession of the prescribed drug at the time of their initial detention. It follows that even if the learned trial judge and the learned judges of the Court of Appeal had directed themselves in accordance with the law as laid down by the court in *Muhammed bin Hassan* they would have arrived at the identical conclusion. To put it in another fashion, a reasonable tribunal arrived with the same facts and properly directing itself would have concluded that the appellants were found in actual possession of the heroin in question, that is to say, independently of the presumption in s 37(d) of the Act. Since the quantity so found in the possession of appellants was several times greater than the statutory minimum of 15g, the court was entitled to conclude that they were trafficking in the said drug.

[71] Another case which demonstrates the same point can be found in the dissenting judgment of KC Vohrah JCA in *Mohamad Radzi bin Abu Bakar v Public Prosecutor* [2002] 3 MLJ 593 wherein he said at pp 808–809:

The case in this appeal is not complicated and the facts establishing a *prima facie* are obvious. The learned judge had relied on s 37(d) of the Act from the fact of custody and control of the four packages of cannabis to presume possession of and knowledge of the cannabis. In actual fact, there was no necessity for him to have relied on the presumption as the evidence was overwhelming that he was in possession of the cannabis and that he knew that the drug was cannabis. The evidence showed that he was wearing not one but two jackets. The top long sleeved jacket had two bundles of cannabis, P4 and P5, one in the right and the other in the left inner pockets of

the jacket the gross weight being about 180g (see the evidence of the chemist, PW1, record of appeal p 6). Anyone wearing it would have felt the packages sticking against the chest and the jacket being weight down by the two packages. Equally telling was the presence on his person of the inner short sleeved jacket which was weighed down by the two packages of cannabis, P6 and P7, one in the right and the other in the left pocket of the jacket, having a gross weight of 192g (see evidence of PW1, record of appeal pp 6 & 7). There cannot have been but a deliberate act on his part to have worn two jackets with packages and it would be an attack on common sense to say that he did not know the packages were packages of cannabis. The other telling piece of evidence which has to be taken into account which shows clearly that the accused was aware of the packages and was aware of its incriminatory nature was that when he was signaled to stop by a customs officer who held up a customs stop sign 'Berhenti Kastam' instead of stopping he turned around and headed in the opposite direction.

Thus, at the close of the prosecution case, there was sufficient positive evidentiary basis that the accused had actual possession and knowledge of the said cannabis and there was no necessity to merely presume that he had possession and knowledge thereof.

As for the trafficking, having been in possession of the cannabis and being aware of its nature, there was also positive evidence that he fell within the meaning of 'trafficking' as defined in s 2 of the Act.

[72] In my view, these cases have the effect of reinforcing the validity of the observation made by Gopal Sri Ram JCA in *Shariff bin Kadir v Public Prosecutor* [2003] 2 MLJ 203, when, in referring to the 'rule against double presumption' he said as follows:

> What the rule requires is that a trial judge should carry out a separate exercise under s37(da) when determining whether an accused is found in possession. In other words, the presumption of possession under s 37(d) is separate and distinct from the phrase 'found in possession' appearing in the prescription created by s 37(da) of the Act.

[73] That observation, I think, sums up correctly, the proposition of law enunciated by the Federal Court in *Muhammed bin Hassan* in construing the provisions of s 37(da) of the Act.

[74] In the circumstances and for the reasons stated, I am, with respect, unable to agree with the learned DPPs that the decision in *Muhammed bin Hassan* is flawed. Like the Federal Court in *Tunde Apatira* (comprising five judges), I take the firm view that there is no valid basis to revisit *Muhammed bin Hassan* in terms propagated by the learned DPPs. In so doing, I am reminded by that venerable decree uttered by the ancient Pharaohs of Egypt in their quest for stability and continuity. 'So let it be Known; So let it be Done!'

Siti Norma Yaakob FCJ:

[75] These four appeals arise from the convictions and sentences of two accused persons, Tan Tatt Eek and Abdul Rahim bin Kalandari Mustan, who

were separately tried in the High Court at Kuala Lumpur in the case of the former, and in the High Court at Penang, in the case of the latter.

[76] At the court of first instance, Tan was convicted on a single count of trafficking in a mixture of heroin and manoacetylmorphines weighing 74.9g under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentenced to death under s 39B(2) of the Act.

[77] Tan appealed against both his conviction and sentence to the Court of Appeal which allowed his appeal, quashed his conviction and set aside his sentence but substituted them with a conviction for the offence of possession under s 12(2) of the Act and sentenced him to 15 years imprisonment from the date of his arrest on 11 August 1997, and ten strokes of whipping under s 39A(2) of the Act.

[78] The public prosecutor appealed against the substituted conviction and sentence imposed by the Court of Appeal, the subject matter of Civil Appeal No 05–40 of 2002(W). Likewise Tan cross-appealed against the orders of the Court of Appeal and his cross-appeal is the subject matter of Civil Appeal No05–41 of 2002(W).

[79] Tan was arrested on the night of 11 August 1997, at the car park of Campagna Meadow Park Condominium in Happy Gardens, Kuala Lumpur. He was seen driving into the car park in a Blue Proton Kancil accompanied by a lady passenger in the seat next to him. He was seen leaving the car carrying an orange bag in his hand and heading for the lift. Five minutes later he emerged from the lift, still carrying the orange bag. As he was about to enter the car, a team of police officers who had been keeping surveillance over him, confronted him and identified themselves. Tan dropped the plastic bag he was carrying and in it, the police found two packages wrapped in newspaper. The contents of the two packages were analysed later to contain a mixture of heroin and manoacetylmorphines weighing 74.9g. His lady friend was also detained but released subsequently.

[80] Based on those facts, Abdul Wahab Patail J made the following findings:

(1) Tan had physical custody and control of the bag.

(2) Tan had knowledge of the contents of the bag and that he knew the nature of the contents to be dangerous drugs.

(3) From the proved possession and knowledge, the learned judge invoked the statutory presumption under s 37(da) to hold that Tan was trafficking in dangerous drugs.

[81] The Court of Appeal only agreed with the first finding of the learned trial judge and expressed the judge's misconception of the law in the following terms.

Here there was no factual matrix on which the trial judge could have inferred that the accused had knowledge of the nature of the dangerous drugs. All that was proved was that he had control and custody of the bag and the packages of the impure drugs and under s 37(d) the presumption could have been invoked for knowledge of the nature of the drugs .

[82] This however was not done by the learned trial judge but instead he invoked the statutory presumption under s 37(da) on the basis of proved possession but since there was no evidence to establish knowledge, the Court of Appeal also held that by invoking the statutory presumption under s 37(da) the learned trial judge had misdirected himself as he had disregarded the decision of this court in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 that ruled against double presumptions, ie neither the prosecutor nor the trial judge could have relied on the presumptions under s 37(d) to presume that the accused was trafficking in dangerous drugs under s 37(da)(iiia).

[83] Based on the facts and the law, the Court of Appeal held that the charge of trafficking could not have been sustainable. As only possession had been proved, Tan could only be called upon to rebut the presumption of possession under s 37(d) and since his defence contained no rebuttal, he could only be guilty of the offence of being in possession of the dangerous drug. It was only for that reason that the Court of Appeal substituted his conviction for trafficking to the lesser offence of possession.

[84] At the Penang High Court, Abdul Rahim was also convicted on a single count of trafficking in cannabis weighing 39,105g and sentenced to death under ss 39B(1)(a) and 39B(2) of the Act respectively.

[85] The incriminating cannabis in Abdul Rahim's case was discovered concealed in a cupboard on the first floor of a house which was raided by the police. At the close of the prosecution's case, Abdul Hamid Mohamed J (as he then was) found that on the evidence before him, Abdul Rahim, as the occupier of the premises, had absolute care, management and supervision of the premises and as such had custody and control of the cannabis. The learned trial judge then invoked not only the deeming provisions of s 37(d) but also ruled that because of the large amount of cannabis found, Abdul Rahim was presumed to be trafficking in the dangerous drug under s 37(da) of the Act. The defence did not seem to have shaken the prosecution's case and in any event the learned trial judge found that Abdul Rahim did not rebut the presumption of trafficking and he was accordingly convicted.

[86] Like Tan, he too appealed to the Court of Appeal against both his conviction and sentence. That court also allowed his appeal, quashed the conviction and set aside the sentence and again substituted them with a conviction for possession under s 6 of the Act and sentenced him to 18 years imprisonment from the date of his arrest on 4 July 1996, and ten strokes of whipping under s 39A(2) of the Act. The Court of Appeal's ruling was founded

on the basis that the learned trial judge made the very error that *Muhammed bin Hassan* seeks to prohibit, ie the invoking of the double presumptions under sub-ss (d) and (da) of s 37 of the Act to arrive at a finding of trafficking. For this very reason the Court of Appeal did not uphold Abdul Rahim's conviction on the charge of trafficking.

[87] Likewise both Abdul Rahim and the public prosecutor appealed against the orders of the Court of Appeal and the subject matter of the former's appeal is Criminal Appeal No 05–68 of 2002(P) whilst the latter's cross-appeal is Criminal Appeal No 05–70 of 2002(P).

[88] Before us, all the parties agree to have a common issue of law argued and that relates to whether the public prosecutor can invoke the statutory presumptions of sub-ss (d) and (da) of s 37 of the Act and apply them in conjunction with one another thereby overturning the principle against double presumptions as laid down in *Muhammed bin Hassan.*

[89] Before dealing with this issue of law, I need to mention that Mr Gubarchand Singh, counsel for Tan, withdrew his cross-appeal and we accordingly struck out Criminal Appeal No 05–41 of 2002(W). Mr Karpal Singh, counsel for Abdul Rahim, then applied to file his memorandum of appeal out of time and since there was no objection from En Shamsul Sulaiman, the deputy public prosecutor, we had allowed his notice of motion to do so.

[90] As the purpose of the proceedings before us is to revisit and review *Muhammed bin Hassan*, our attention was drawn to the fact that the same exercise had already been undertaken by a three member panel of this court in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 and by a five member panel in *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259. As such there is no justification for another revisit.

[91] In *Dalip Bhagwan Singh,* one of the issues raised was on the question of judicial precedent, the need to adhere to the latest decision of this court on a point of law particularly when a conflict arises from two separate decisions of this court. This issue, we consider, does not fall within the issue of law that the public prosecutor intends to raise in the present proceedings before us and as such cannot form the basis of denying him the right to be heard.

[92] In *Tunde Apatira*, all the three appellants were convicted for trafficking in drugs and the main complaint was that the trial judge had invoked the statutory presumptions under sub-ss (d) and (da) of s 37 to convict them of trafficking, a finding that was confirmed by the Court of Appeal. This court held that even without the aid of s 37(d), possession was never an issue in that case as there was overwhelming evidence of actual possession as the accused had swallowed the dangerous drug but what was in issue was whether the drug swallowed was gold dust or heroin.

[93] That said, there appears to be no basis to disallow the public prosecutor from submitting that the principles of law enunciated in *Muhammed bin Hassan*

disallowing the automatic application of the statutory presumptions in s 37(d) and (da) can no longer be regarded as good law.

[94] Sub-sections (d) and the relevant parts of (da) of s 37 of the Act insofar as they are relevant to the facts in Tan's and Abdul Rahim's cases contain the following provisions:

> 37 In all proceedings under this Act or any regulation made thereunder:
>
> (d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug, shall until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;
>
> (da) any person who is found in possession of:
>
> (iiia) a total of 15 grammes or more in weight of heroin, morphine and manoacetylmorphines or a total of 15 grammes or more in weight of any two of the said dangerous drugs;
>
> (iv) 200 grammes or more in weight of cannabis;
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

[95] *Muhammed bin Hassan* had interpreted those provisions in the following manner:

> (1) ...both sub-ss (d) and (da) of s 37 of the Act, being penal provisions must be strictly construed and must not be extended beyond their clear meaning,
>
> (2) The wordings … are clear and unequivocal. … and their meanings, must be determined from the language employed and the two subsections must be taken to mean exactly what they respectively say.
>
> (3) …there is a clear undeniable distinction between the word 'deemed' used in s 37(d) and the word 'found' employed in s37(da) of the Act. The 'deemed' state of affairs in s 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody or control. Such presumptions as under s 37(d) (and, for that matter, the one under s 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof custody or control in s 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law.

It is a deduction which the law requires the trial court to make. On the other hand, the word 'found' in the opening phrase of s 37(da) connotes a finding after a trial by the court.

(4) To come to the presumptions of possession and knowledge under s 37(d), one need only to arrive at a finding of having had 'in custody or under ... control anything whatsoever containing' the drug (as opposed to the drug itself) whereas to arrive at the presumption of 'trafficking' under s 37(da), a finding of being 'in possession' of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified).

(5) In view of the above differences, it would be unduly harsh and oppressive to confine the automatic application of presumption upon presumption — a construction that ought to be adopted only if upon the wordings of the two subsections, such an intention of Parliament is clear, which, is not.

(6) ...to constitute possession under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

[96] There is now a direct attack on the interpretations of the two subsections to show that *Muhammed bin Hassan* had been wrongly decided based on the grounds that the court had misdirected itself:

(1) when it applied the strict construction rule when construing the two subsections;

(2) when it declared that the intention of Parliament was that the two subsections may not be invoked and applied in conjunction with one another;

(3) when it applied the general law of evidence in construing the two subsections; and

(4) when it gave an unacceptable meaning to the word 'found' used in s 37(da).

[97] The prosecution relies on the definition of a penal statute as expressed by *Halsbury's Laws of England* (4th Ed) Vol 44 p 909, to show that the court's interpretation of the provisions of the two subsections to be penal in nature is wrong in law and consequently its finding that the subsections have to be strictly construed is also flawed.

[98] *Halsbury's* regards a statute as penal for purposes of construction 'if it imposes a fine, penalty or forfeiture other than a penalty in the nature of liquidated damages, or other penalties which are in the nature of civil remedies'.

[99] *Halsbury*'s definition seems to look at the broader picture of a statute as opposed to any particular provision in such a statute. Clearly the two subsections,

per se, can hardly be considered as penal in nature as the language used connotes the recognition of evidence for the statutory presumptions to arise, and as such, the inclusion of any provision for any penalty to be imposed, does not arise. However when viewed in the broader sense that the two subsections form part and parcel of the Act, which contain provisions like ss 6, 10, 12(3), 39A(1) and (2) and 39B(2), which prescribe the appropriate penalties for particular offences, the two subsections are brought within the confines of a statute which is penal in nature. No doubt the two subsections are special provisions relating to the creation of rebuttal presumptions which are of evidential value in trials of offences prescribed under the Act but viewed in the broader sense that they form part of a penal statute, I see nothing objectionable to the two subsections being construed strictly and must not be extended beyond their clear meaning.

[100] What in law is their clear meaning?

[101] To answer this question, it is necessary to consider certain aspects of the Act, namely Parliament's intention or purpose in incorporating the two subsections into the Act, the nature of the expressed wordings of the two subsections and the proper interpretations to be given to them.

[102] The provisions of sub-s (d) had their origin since the passing of the Act itself, unlike those of sub-s (da) which were incorporated into the Act and enforced as law on 15 November 1977, by way of amendment through Act A390.

[103] Since sub-s (da) follows immediately after sub-s (d), this has prompted the prosecution to advance the argument that Parliament must have intended the two subsections to be applied in tandem and not separately or individually for if that was indeed intended, the provisions of sub-s (da) would be inserted after sub-s (j) of the same section as sub-s (k).

[104] I do not consider that the intention of Parliament can be ascertained in the order in which amendments are incorporated into an Act. It must be remembered that s 37 deals principally with provisions relating to presumption of law, the creation of which depends on the varying circumstances as stated in sub-s (a) to (d), (da) and (e) to (j). The fact that the provisions of sub-s (da) follow immediately after sub-s (d) may well be attributed to convenience and the art of drafting and I am not prepared to consider any other reason beyond that. Short of Parliament stating that both subsections are to be read conjunctively in clear and uncertain terms, it is not proper to assume that intention in the manner as propounded by the prosecution.

[105] In essence, the presumption under s 37(d) works as follows. Once it is proved that a person has control and custody of a dangerous drug, he is deemed not only to be in possession of the drug but is also deemed to have knowledge of the nature of the drug until the contrary is proved. As such,

without the evidence of custody or control, the rebuttable presumption of possession and knowledge cannot arise.

[106] On the other hand sub-s (da) provides that once there is a finding of possession of a prescribed drug, the weight of which falls within the quantity specified in the various paragraphs of the subsection and that such possession is not in accordance with the authority of the Act or any other written law, the presumption of trafficking arises, until the contrary is proved.

[107] For practical purposes, in trials for offences under ss 6 and 12(2) of the Act, all that the prosecution need do to invoke the rebuttable presumptions under sub-s (d) is to produce credible evidence, direct or circumstantial, to establish that there is custody or control of the dangerous drug on the part of the accused person.

[108] However to invoke the presumption of trafficking under sub-s (da) in order to establish a *prima facie* case of trafficking under s 39B(1) of the Act at the close of the prosecution case, all that needs to be introduced at the trial is sufficient evidence to establish:

(1) possession of the drug by the accused person, as understood in criminal law.

(2) the weight of the drug to bring it within the relevant minimum quantity specified by law,

(3) lack of authority on the part of the accused person.

[109] Clearly there is a distinct difference in the wording and meanings of the two subsections, and I say, it is this difference that rule against the Prosecution's contention that the finding of deemed possession under subsection (d) can be read into subsection (da) as proved possession, to trigger the presumption of trafficking. In any event there are no clear words or expression in the Act to arrive at the conclusion that Parliament intended that trafficking can be presumed by the joint operation of the presumptions in the two subsections. Reference to speeches outlining the intention and purpose of incorporating sub-s (da) into the Act and its operation when the bill to introduce it was debated in Parliament, cannot fill the gap caused by the absence of such expressed intention as the correct approach *'is to ascertain the meaning of the words employed by Parliament rather than the intention of Parliament'*: per Chong Slew Fai CJ (Sabah & Sarawak) in *Muhammed bin Hassan*.

[110] It is therefore my considered opinion that there are no compelling reasons to overrule the principles of law enunciated in *Muhammed bin Hassan* as those principles have been correctly decided.

[111] Finally I come to the closing submission as to whether the ruling against double presumptions has retrospective effect on cases decided before *Muhammed bin Hassan*. This is so as the conviction for trafficking against Abdul Rahim was recorded on 23 September 1997, before *Muhammed bin Hassan*,

A although the Court of Appeal's decision substituting the conviction adopted the rule against double presumptions as the appeal was heard after *Muhammed bin Hassan*.

[112] The time honoured principle of law as regards judicial precedent and the need to adhere to the latest decisions of the highest court in the land, is B the basis on which certainty in the law is achieved and upon which individuals can rely to conduct their affairs. It is with these guidelines or principles in mind that rulings from this court, particularly when it decides to resolve conflicts arising from separate decisions on points of law, are never intended to be interpreted retrospectively so as to prevent the danger of uncertainty or disturb C the basis on which contracts and fiscal arrangements had been entered into. Perhaps the only exception can be found in situations like that experienced by Abdul Rahim when he was convicted for trafficking at a time when the rule against double presumptions had not been decided to be oppressive, but following his appeal to the Court of Appeal, the rule had worked towards his D advantage. As such, restrospectivity can only operate in pending cases but not where cases have been decided to their finality.

PS Gill FCJ:

E **[113]** All the four appeals arise as a result of drug trafficking offences under s 39(B)(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The facts pertaining to these appeals have been sufficiently stated in the draft judgments of my brother and sister judges and needs no further elaboration on my part.

[114] The main thrust of these appeals in particular by the public prosecutor F relates to the construction of s 37 of the Act in that, whether the presumption of trafficking under s 37(da) of the Act can arise out of a presumption of possession under s 37(d).

[115] The Federal Court case of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 was referred to at length in the said appeals. In short, the said case G decided that to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients hereunder giving rise to the presumption of trafficking, there must be an express affirmative finding of possession and not a legal presumption of possession as provided in s 37(d) of the Act. In other words, the presumption of possession under s 37(d) of the Act cannot be H applied to invoke the presumption of trafficking under s 37(da).

[116] The learned deputy urged the court to revisit the case of *Muhammed bin Hassan* which case established the principle of what is commonly stated as the 'rule against double presumption'. The learned deputy argued that the reasons given in *Muhammed bin Hassan* in propounding the 'rule against double presumption' I were untenable bearing in mind the true construction of the wording in s 37(d) and 37(da) of the Act. It was argued that *Muhammed bin Hassan* wrongly applied the strict construction rule in construing s 37(d) of the Act. It was further

submitted that s 37 of the Act is not a penal provision, as it does not impose a fine, penalty or forfeiture. In support of his argument the learned deputy referred to a passage in *Halsbury's Laws of England* (4th Ed) Vol 44, para 910, which reads:

> A statute must be regarded as penal for purposes of construction if it imposes a fine, penalty or forfeiture, other than a penalty in the nature of liquidated damages, or other penalties which are in the nature of civil remedies.

[117] It is my view that it is not correct to state that in *Muhammed bin Hassan* the court applied the strict construction rule. Indeed if one looks closely at the judgment, it is clear that the literal rule of construction was applied. This is borne out in the judgment of the court at p 288 para D:

> Since the literal meanings of the two subsections are intelligible, they must not be extended on the ground that there has been a slip or a matter not provided for which should have been provided for.

[118] My learned brother Tan Sri Ahmad Fairuz Chief Justice in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 quoted with approval the Indian Supreme Court's decision in *Hiralal Ratan Lal v The Sales Tax Officer, Section III, Kanpur* AIR 1973 SC 1034 where the court stated:

> In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that we have to see at the very outset is what does that provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, we need not call into aid the other rules of construction of statutes. The other rules of construction of statutes are called into aid only when, the legislative intent is not clear.

[119] The learned deputy further submitted that the intention of parliament was to render the automatic application of s 37(da), once s 37(d) of the Act had been successfully invoked, as illustrated in previous cases decided by our courts, before the decision in *Muhammed bin Hassan.* He referred to the speech of the Minister ('the Hansard') when tabling the amendment to insert s 37(da) and also to s 17A of the Interpretation Act 1967. In addition, he submitted that if it was the intention of Parliament that s 37(d) and s 37(da) were to be completely exclusive of one another, then the logical step would be to add the presumption of trafficking as the next letter of the alphabet, ie as s 37(k). He added that the fact that para (da) immediately follows para (d) is further proof of this intention.

[120] With respect, I am unable to find any assistance from the above submissions of the learned deputy. As to the speeches in Hansard, it only sought to introduce into the Act the provision of a presumption of trafficking which might be invoked upon proof of possession of specific quantities of dangerous drugs, and made no mention of the intention of Parliament regarding

A the applicability of the double presumption. Furthermore, this issue was dealt with in *Muhammed bin Hassan*. Section 17A of the Interpretation Act 1967 is a statutory provision for the courts to take a purposive approach in the interpretation of statutes. As decided in *Muhammed bin Hassan*, the two subsections which the court was called upon to construe, suffer no ambiguity.

B **[121]** I am in entire agreement with the sentiments expressed in the case of *Duport Steels Ltd & Ors v Sirs & Ors* [1980] 1 WLR 142, wherein Lord Diplock at p 157 held:

> Where the meaning of the statutory words is plain and unambiguous it is not for
C the judges to invent fancied ambiguities as an excuse for failing to give effect to the plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral...

[122] As to the intention of Parliament, I agree with the approach taken by this court in *Muhammed bin Hassan*. Chong Siew Fai CJ (Sabah & Sarawak) at
D p 289 said:

> As regards the submission of the learned deputy public prosecutor on the intention of Parliament, the correct approach, in our opinion is to ascertain the meaning of the words employed by Parliament rather than the intention of Parliament. As
E Lord Reid observed in *Black-Clawson International Ltd v Papierwerke Ag* [1975] 2 WLR 513 at p 517:
>
> > We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.

F **[123]** Next, the learned deputy public prosecutor submitted that in *Muhammed bin Hassan* the court misdirected itself when it failed to apply correctly the meaning of the word 'proved' as found in the Evidence Act 1950.

[124] The relevant section of the Evidence Act 1950 (s 3) provides:

G
> 'proved': a fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

H **[125]** And s 4(2) of the Evidence Act 1950 provides that:

> Whenever it is directed by this Act that the court shall presume a fact, it shall regard the fact as proved unless and until it is disproved.

[126] In short what the learned deputy was trying to submit was that the
I effect of ss 3 and 4(2) of the Evidence Act 1950 when read together shows that the court is not concerned with how a fact is proved, ie whether by direct evidence or presumption.

[127] However, it is pertinent to note that s 4(2) of the Evidence Act 1950 only qualifies it to that particular Act, and excludes its application to presumptions other than those found in the Evidence Act 1950.

[128] Furthermore, the Dangerous Drugs Act is a special Act with its own presumptions that has penal consequences whereas the Evidence Act 1950 is a general Evidential Act. In this respect, I agree with the High Court decision in the case of *Tun Datu Haji Mustapha Bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (NO 2)* [1986] 2 MLJ 420 which construed the words 'this Act' appearing in s 4 to exclude its application to presumptions other than those found in the Evidence Act.

[129] Finally, the learned deputy argued that the court in *Muhammed bin Hassan* misdirected itself on the construction of the word 'found' in s 37(da) of the Act. He submitted that the word 'found' in the context it is used in the section is the past tense of the word 'find'. He then referred to a number of dictionaries, in particular *Ballentine's Law Dictionary* (3rd Ed) at p 479 where the word 'finding' refers to 'a judicial statement of a conclusion of law or fact'. Premised on that, he contended that the word 'found' in s 37(da) refers to both finding in law as well as finding of facts. In other words, it is not restricted to the meaning ascribed to it by this court in *Muhammed bin Hassan* that there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

[130] Dato' Mohd Yusof, the learned deputy in his argument put forward further submissions in an attempt to persuade this court to depart from *Muhammed bin Hassan*. He contended that the court in *Muhammed bin Hassan* failed to look at the distinction in the subsequent phrase after the word 'found' in s 37(d) and s 37(da) of the Act. It was suggested that the words 'found to have had' and the words 'found in possession' denote two different meanings. He contended that the words 'found to have had' suggest a factual finding and the words 'found in possession' to mean a finding both in law and fact which include presumptions. He then referred to s 37(d) and (e) of the Act and argued that the words 'found to have had' used therein meant a factual finding, and s37(da), (f) (g) and (h) of the Act where the word 'found' is used to mean a finding both in law and fact.

[131] By way of analogy, the learned deputy referred to the Singapore Act where s 17 of the Act before amendment read:

> Any person who is proved or presumed to have had in his possession...

and the said section after amendment which reads:

> Any person who is proved to have had in his possession... (omitted the word 'presumed')

[132] In other words, the learned deputy is contending that the words 'proved to have had in his possession' suggest a factual finding. On the contrary, if the

words 'proved to be in possession' were used it would suggest both factual and a finding based on presumption.

[133] In support of his contention he referred to *Francis Bennion on Statutory Interpretation* (4th Ed) at p 1055 part xxxviii s 379: 'Ejusdem generis principle' Example 379.1 where it is stated:

> The phrase 'having in possession', if taken alone, embraces the concept of legal as well as physical possession. When used in an enactment which reads 'having in possession or conveying in any manner' (where 'conveying' is clearly limited to physical removal) the phrase has by implication a more limited meaning. It must be limited, making the one co-extensive with the other, and confirming it to 'having' *ejusdem generis* with 'conveying'.

[134] Since the word 'found in possession' under s 37(da) is not qualified or limited by any subsequent words, it is intended to apply to legal as well as factual possession, argued the learned senior deputy public prosecutor. However, this argument seems to be considered by the court in *Muhammed bin Hassan*. This is what the court said at p 290 para G when comparing our Act to the Singapore Act:

> And, it is convenient to state here, in answer to the submission of the learned deputy public prosecutor, that, for the purpose of the present issue in question, there is, in our opinion, no material difference between the words 'proved to have had in ... possession' and the words 'found in possession' used in the respective sections of the two Acts. Both necessitate a finding or proof of possession beyond reasonable doubt based on evidence.

[135] The learned deputy also submitted that in *Muhammed bin Hassan* the court misdirected itself when the court treated the 'deeming' provision in s37(d) as equivalent to the 'presumption' provision in s 37(da). He contended that there is a distinction between the 'deeming' provision and 'presumption' provision. He then referred to the *New Shorter Oxford English Dictionary* and *Black's Law Dictionary* (7th Ed) to draw the distinction. 'Deem' is when you equate or give effect to, whereas 'presume' is when you bring something higher from a stated basic fact. In support he cited a passage in NS Bindra's *Interpretation of Statutes* (8th Ed) (1997) at p 46 under the heading 'Deeming provisions' where it is stated:

> Where the legislature says that something should be deemed to have been done which in truth has not been done, it creates a legal fiction and in that case the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion.

[136] Further at p 47 it states:

> When a statute declares that a person or thing shall be deemed to be or shall be treated as something which in reality it is not, it shall have to be treated as so during the entire course of the proceeding.

[137] Based on the above, he concluded by submitting that s 37(d) is a deeming provision whereas s 37(da) is a presumption provision. His contention was that when two different words are used in a statute they refer to different interpretations. In this respect, I refer to the case of *Majlis Peguam & Anor v Tan Sri Dato' Mohamed Yusoff Bin Mohamed* [1997] 2 MLJ 271 where Mohd Azmi FCJ, referred to the Court of Appeal decision in *Lee Lee Cheng (F) v Seow Peng Kwang* [1960] MLJ 1 where Thompson CJ emphasised the distinction between the word 'jurisdiction' used in the Second Schedule of the Courts Ordinance 1948, and 'power' employed in the Third Schedule and concluded that:

> It is axiomatic that when different words are used in a statute, they refer to different things and this particularly so where the different words are, as here, used repeatedly.

[138] However, it is obvious that there is a material difference between the word 'jurisdiction' and 'power' as stated in that case. A court cannot exercise its powers over which, by reason of their nature or by reason of extra-territoriality, it has no jurisdiction or vice versa. However, the distinction between the word 'deem' and 'presume' in my view is a very fine one, if at all. As such, I do not think the above case can be used in argument to the present issue before us.

[139] Furthermore, none of the authorities on the interpretation of statues cited to us clearly distinguishes or states that there is a difference between the 'deeming provision' and 'presumption'. Basically, we are urged to assume as such, based on the definition and interpretation given to such a provision. In fact, the title to s 37 of the Act refers to 'presumptions' and no distinction is drawn in the Act between the word 'deem' and 'presumption'. That being the case, it is clear that the legislature did not draw any difference between the word 'deem' and 'presumption' as used interchangeably in the Act.

[140] In response to the argument of the learned deputy, both the learned counsels before us basically urged us not to depart from this court's decision in *Muhammed bin Hassan* for the reasons stated therein. It was further submitted that the logic and reasoning for interpreting the subsections in the way in which it was done in *Muhammed bin Hassan* was clear and correct.

[141] Having scrutinized the submissions and the authorities given to us by both parties, I find myself compelled not to depart from *Muhammed bin Hassan* for a number of reasons.

[142] Firstly, we should not interpret the intention of Parliament by merely importing words from dictionary meaning. The Hansard which can be used as an aid to interpret the intention of Parliament is of no assistance in the present case.

[143] In his book on *Principles of Statutory Interpretation* (9th Ed) Justice GP Singh under the heading 'Dictionaries' at p 303 states the following:

A statute cannot always be construed with the dictionary in one hand and the statute in the other. Regard must also be had to the scheme, context and to the legislative history. In the words of Jeevan Reddy J in *Commissioner of Income Tax Orissa v NC Budhraja & Co* 1993 AIR 2529:

> A dictionary meaning cannot be adopted if it will make some existing words redundant or will require reading of some additional words: *Dental Council of India v Hari Prakash* AIR 2001 SC 3303.

[144] Secondly, the operation of the presumptions under s 37(d) and (da) of the Act in tandem must be express, clear and unequivocal and cannot be exercised by inference, or conjecture particularly in criminal proceedings.

[145] Thirdly, I am mindful of the principle that the court should not interfere or usurp the functions of the legislature.

[146] Fourthly, I tend to agree with the reasoning in *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259, that it is a bad policy for the apex court to leave the law in a state of uncertainty by departing from our recent decisions.

[147] For the foregoing reasons, I reject the argument to the effect that *Muhammed bin Hassan* was wrongly decided and ought no longer to be applied.

[148] Finally, on the question of retrospectivity I concur with the views expressed by my learned brother Dato' Abdul Malek Ahmad (PGA), and my learned sister Dato' Siti Norma Yaakob (FCJ) in their respective draft judgments.

Augustine Paul JCA:

[149] The two appeals were heard together as they involved a common question of law, that is to say, whether under the Dangerous Drugs Act 1952 ('the Act') the presumption of possession under s 37(d) can constitute evidence of possession under s 37(da). All references in this judgment to sections are references to sections of the Act.

[150] In order to appreciate the arguments advanced by both parties it is first necessary to set out the relevant parts of s 37. They read as follows:

> 37 In all proceedings under this Act or any regulation made thereunder:
>
> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;
>
> (da) any person who is found in possession of:
>
> (i) 15 grammes or more in weight of heroin;
>
> (ii) 15 grammes or more in weight of morphine;

(iii) 15 grammes or more in weight of heroin, morphine and monoacetylmorphines or a total of 15 grammes or more in weight of any two of the said dangerous drugs;

(iv) 1,000 grammes or more in weight of prepared opium;

otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

[151] While s 37(d) creates a presumption to establish possession s 37(da) provides that possession of dangerous drugs of or above the weight specified therein shall be presumed to be trafficking in such drug. In *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 this court considered the use of the two presumptions together and Chong Siew Fai CJ (Sabah and Sarawak) in writing for the court said at pp 288-289:

> The wordings of sub-ss (d) and (da) of s 37 are clear and unequivocal. That being so, their meanings must be determined from the language employed and the two subsections must be taken to mean exactly what they respectively say. Also, generally speaking, if the words in a statute admit of two interpretations, then they are not clear, and if one interpretation is more favourable to an accused than the other, the court will adopt the one more favourable to the accused.
>
> Since the literal meanings of the two subsections are intelligible, they must not be extended on the ground that there has been a slip or a matter not provided for which should have been provided for. Any ambiguity or slip would be a matter for the legislature. In *Magor & St Mellons Rural District Council v Newport Corp* [1952] AC 189, Lord Simonds observed (at p 191):
>
> > The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited.
> >
> > If a gap is disclosed, the remedy lies in an amending Act.
>
> In our view, there is a clear undeniable distinction between the word 'deemed' used in s 37(d) and the word 'found' employed in s 37(da) of the Act. The 'deemed' state of affairs in s 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody or control. Such presumptions as under s 37(d) (and, for that matter, the one under s 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s 37(d) by the prosecution), the court *must* in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make.
>
> On the other hand, the word 'found' in the opening phrase of s 37(da) connotes a finding after a trial by the court.

> Furthermore, the basic or primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s 37(d) of the Act and those required to raise 'presumed … trafficking' under s 37(da) are different. To come to the presumptions of possession and knowledge under s 37(d), one need only to arrive at a finding of having had 'in custody or under … control anything whatsoever containing' the drug (as opposed to the drug itself) whereas to arrive at the presumption of 'trafficking' under s 37(da), a finding of being 'in possession' of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified). In view of the above difference, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public prosecutor — a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.
>
> In our view, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

[152] In substance therefore the judgment is based on the grounds that, firstly, as the word 'found' in s 37(da) connotes a finding after a trial while the presumed fact under s 37(d) is one that the court is compelled by law to deduce, there is a distinction between them, and, secondly, as the basic facts necessary to raise the presumptions in s 37(d) and s 37(da) are different, it would be harsh and oppressive to apply the double presumptions together unless it is the intention of Parliament, which is not. Accordingly, the phrase 'found in possession' in s 37(da) was construed to mean an express affirmative finding of possession based on evidence thereby excluding 'deemed' possession arising from s 37(d). The validity of this conclusion would depend on the meaning and proper interpretation of the phrase 'found in possession' in s37(da). If indeed it is a reference to only affirmative evidence of being found in possession then it would not include 'deemed' possession. It would be otherwise if its meaning extends beyond affirmative evidence. Its proper meaning would depend on the intention of Parliament in enacting it.

[153] In commenting on the intention of Parliament in passing a statute Bindra's *Interpretation of Statutes* (7th Ed) says at p 472:

> If the intention of the Legislature can be ascertained all rules of construction must yield to the legislative intention (*Board of Trustees v John Steele* [1933] SCR 47). They cannot override the legislative intent specifically expressed in the enactment (*State of UP v Jaipal Singh Naresh* [1978] All LJ 936). If the intention of the legislature is clear, that intention constitutes the law.

[154] The intention of Parliament is conveyed either expressly or impliedly by the language used by the legislature (see *Moolchard v Moraraj Kumar Jai Singh* AIR 1963 Raj 219; *Ganeslal v Board of Revenue, Rajasthan* [1966] 16 ILR Raj 577). As Bindra's *Interpretation of Statutes* (7th Ed) says at p 474:

The primary duty of a court is to give effect to the intention of the Legislature in the words used by it and no outside consideration can be called in aid to find another intention (*Nathu Prasad v Singhai Kapurchand* [1976] JLK 340). It is a well established canon of interpretation that the intent of the Legislature is to be gathered from the words used (*Secretary to Government, Punjab Revenue v Jagar Singh* [1977] Rev LR 104) and that if the words used have not acquired any technical meaning they should be deemed to have been used in their ordinary meaning (*SS Harishchandra Jain v Capt Inder Singh* [1977] JLJ 312).

[155] Thus when the words of a statute are clear, plain and unambiguous, that is to say, they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of the consequences (see *Nelson Nelson Motis v Union of India* AIR 1992 SC 1981). As Tindal CJ said in the *Sussex Peerage Case* (1844) 11 C1 & F 85 at p 143:

If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver.

[156] It is clear that the phrase 'found in possession' in s 37(da) has not been restricted or qualified in any way by the use of other words. It must thus be interpreted as it stands in its ordinary meaning. There can be no dispute that the phrase is a reference to a finding of possession made by the court. What is in dispute is the nature of evidence that it has in contemplation. The word 'found' is the past tense of the word 'find'. A finding is made by the court upon a consideration of all the evidence adduced in a trial. In adverting to the meaning of the word 'finding' the Allahabad High Court said in *Pt Hazari Lal v Income Tax Officer, Kanpur* (1960) 39 ITR 265 at p 272:

The word 'finding', interpreted in the sense indicated by us above, will only cover material questions which arise in a particular case for decision by the authority hearing the case or the appeal which, being necessary for passing the final order or giving the final decision in the appeal, has been the subject of controversy between the interested parties or on which the parties concerned have been given a hearing.

[157] Ballentine's *Law Dictionary* (3rd Ed) defines the word in the following terms:

A judicial statement of a conclusion of law or fact. State ex ref *Higgins v Beloit*, 74 Wis 267, 42 NW 110.

[158] Ordinarily, therefore, the word 'found' includes a conclusion of law. A'conclusion of law' is defined in Black's *Law Dictionary* (6th Ed) as:

Statement of court as to law applicable on basis of facts found by jury. Finding by court as determined through application of rules of law.

[159] A presumption of law (like s 37(d)) is a rule of law (see Field's *Law of Evidence* (12th Ed) Vol I p 388). It arises when the rule of law is applied to facts that require to be proved and have in fact been proved. It is therefore a

conclusion of law. Thus a presumption of law must ordinarily come within the meaning of 'found in possession' in s 37(da); thereby bringing 'deemed' possession within its ambit. At this stage it is perhaps necessary to refer to the part of the judgment in *Muhammed bin Hassan* where it was held that there is '…no material difference …' between 'proved to have had in possession' and 'found in possession'. It was then concluded that both necessitate a finding or proof of possession beyond reasonable doubt based on evidence. If this is intended to mean that the word 'proved' is also a reference to affirmative evidence it becomes necessary to refer to *Sengupta on Evidence* where it says at p 43:

> Proof, apart from argument and inference drawn from facts in evidence, is effected by: (a) evidence; (b) presumptions; and (c) judicial notice (Phipson 12th Ed S2). Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of inquiry.

[160] Thus the word 'proved' also includes a presumption. In view of this result the conclusion ought to be that 'found' also includes a presumption as it has been correctly recognised that there is no material difference between both the concepts. Be that as it may, the effect of the judgment in *Muhammed bin Hassan* is to narrow down the scope of the presumption in s 37(d). If indeed that is the intention of the Act then the exclusion of 'deemed' possession from the ambit of s 37(da) would be justified. This brings into focus the circumstances in which a statutory provision can be restrictively construed so as to limit the effect of a presumption.

[161] The general rule is that the consequences of a presumption, a legal fiction, must be allowed to take its natural course. Thus in commenting on the effect of a legal fiction Jeevan Reddy J said in *Union of India v Jalyan Udyog* AIR 1994 SC 88 at pp 96-97:

> It is well settled that where a fiction is created by a provision of law, the court must give full effect to the fiction, and as is often said, it should not allow its imagination to be boggled by any other considerations. Fiction must be given its due play; there is to be no half-way stop.

[162] Where it is to take its natural course '…it shall have to be treated as so during the entire course of the proceeding' (see Bindra's *Interpretation of Statutes* (7th Ed) p 45). It must therefore be given its due play for all purposes of the trial without any half-way stop. However, the consequences of a fiction may be restricted. As Lord Asquith of Bishopstone said in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109 at pp 132–133:

> If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs;

it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

[163] In law, therefore, the scope of a legal fiction as the one in s 37(d) can be restricted. As to whether its effect has in fact been restricted would depend on the intention of Parliament in enacting s 37. As stated earlier, in *Muhammed bin Hassan* s 37(da) was construed the way it was done to exclude the operation of a presumption upon a presumption on the ground that it was not intended by Parliament and that it would be harsh and oppressive to do so.

[164] In determining the intention of Parliament in enacting s 37 it must be remembered that it is a rule of construction that each section in each statute must, for its true meaning and effect, depend on its own language, context and setting (see *State of UP v Tobit* AIR 1958 SC 414). The fact that s 37(d) is itself a subsection of s 37 makes no difference to its interpretation. It is an elementary rule that the construction of a section is to be made of all the parts together and that it is not permissible to omit any part of it (see *State of Bihar v Hiralal* AIR 1960 SC 47). Subsections in a section must, therefore, be read as part of an integral whole and as being interdependent, each portion throwing light, if need be, on the rest and a harmonious construction should be placed on them for the purpose of giving effect to the legislative intent (see *Madaulal Fakir Chand v Changdeo Sugar Mills* AIR 1962 SC 1543; *Asharfi Lal v Board of Revenue* [1977] AWC 454). Thus the language used in the enacting part of s 37 plays a critical role in ascertaining its intention. It makes it applicable to '…all proceedings under this Act…' The effect of a somewhat similar provision arose for consideration in CIT, *Bombay v Bombay Corp* AIR 1930 PC 54. In that case s 43 of the Indian Income Tax Act 1922 provided that under certain circumstances an agent shall for all the purposes of the said Act be deemed to be such agent of a non-resident person and s 42 further provided that such agent 'shall be deemed to be, for all the purposes of this Act, the assessee'. The Privy Council held that such agent was an assessee for all the purposes of the said Act and hence chargeable to income tax, assessee being defined by s 2(2) as the person by whom income tax is payable. See also *Marathaei d/o Sangulullai (Suing On Behalf Of The Estate Of Thangayah Aupulley) & Anor v Syarikat JG Containers (M) Sdn Bhd & Anor* [2003] 2 MLJ 337. Thus s 37 which deals with various presumptions has been designed by its clear words to apply to all proceedings under the Act. As the intention of Parliament is clearly ascertainable all other rules of construction must yield to the legislative intention. It follows that the manner of proving possession as enunciated in s 37(d) must apply to all proceedings under the Act. Full effect must therefore be given to the fiction in s 37(d) without in any way creating any hurdles to its inevitable corollaries. The inevitable conclusion is that s 37(d) is not restricted in its application to any proceeding under the Act.

[165] The resultant matter for determination is whether s 37(d) also applies to s 37(da) — a provision which deals with a matter of procedure as it involves

a presumption. That would depend on whether it comes within the meaning of the word 'proceedings' in the enacting part of s 37. The word is defined in *Black's Law Dictionary* (6th Ed) as:

> In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment…
>
> An act which is done by the authority or direction of the court, agency, or tribunal, express or implied; an act necessary to be done in order to obtain a given end; a prescribed mode of action for carrying into effect a legal right. All the steps or measures adopted in the prosecution or defense of an action. *Statter v United States, CCA Alaska*, 66 F 2d 819, 822. The word may be used synonymously with 'action' or 'suit' to describe the entire course of an action at law or suit in equity from the issuance of the writ or filing of the complaint until the entry of a final judgment, or may be used to describe any act done by authority of a court of law and every step required to be taken in any cause by either party. The proceedings of a suit embrace all matters that occur in its progress judicially.
>
> Term 'proceeding' may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding.

[166] It is thus manifestly patent that the word 'proceedings' also includes matters of procedure like steps adopted in the prosecution of an action which in turn would include the manner of proving or fixing the burden of proof in establishing an issue. Section 37(da) is such a matter of procedure and, accordingly, falls within the meaning of 'proceedings' in s 37. Section 37(d) therefore applies to s 37(da). The result is that 'deemed' possession in s 37(d) cannot be excluded from the ambit of s 37(da). It must be stressed that even though this approach amounts to the operation of a presumption upon a presumption it is not unlawful as it is expressly authorised by Parliament. In this regard *Principles of Statutory Interpretation* by GP Singh (6th Ed) says at 249:

> The legislature may sometimes create a chain of fictions by the same Act or by succeeding Acts. If A is deemed to be B, and B is deemed to be C, the inevitable consequence may be that A is deemed to be C. By s 8 or the Abolition of Privy Council Jurisdiction Act 1949, any order made by His Majesty in Council on an Indian Appeal was to have effect as if it were an order or decree made by the Federal Court and by Article 374(2) of the Constitution, judgments and orders of the Federal Court are to have the same effect as if they had been delivered or made by the Supreme Court. The legal effect of these two fictions is, that an order in an Indian Appeal made by the Privy Council before its jurisdiction was abolished, is to have effect as if it were an order made by the Supreme Court (*Yellappagouda Shankargouda Patil v Basangouda Shiddangouda Patil* AIR 1960 SC 808).

[167] As it is the clear intention of Parliament to allow the presumption contained in s 37(d) to take its natural course, its use in s 37(da) cannot be restricted in any manner. It must thus be given its full effect. It follows that the ordinary meaning of the phrase 'found in possession' in s 37(da) is not

restricted in any way even though it involves a presumption. It must therefore include a conclusion of law thereby bringing 'deemed' possession in s 37(d) within its scope.

[168] It may perhaps be also necessary to consider whether the operation of the presumption in s 37(d) upon the presumption in s 37(da) is harsh and oppressive if indeed it can be argued that the intention of Parliament in creating them is not clear. In commenting on the course to be adopted in such a situation *Principles of Statutory Interpretation* by GP Singh (6th Ed) says at p 89:

> If the language used is capable of bearing more than one construction, in selecting the true meaning regard must be had to the consequences resulting from adopting the alternative construction. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results. This rule has no application when the words are susceptible to only one meaning and no alternative construction is reasonably open.

[169] In *Muhammed bin Hassan* the operation of the double presumption was held to be harsh and oppressive in view of the different basic facts that need proof under s 37(d) and s 37(da) and that in view of the difference the automatic application of a presumption upon a presumption can be adopted only if it was intended by Parliament, which was not. I must add that if this reasoning can be sustained then the interpretation accorded to s 37(da) cannot be impugned. However, it is my misfortune to say that the conclusion was arrived at without a consideration of the circumstances in which double presumptions can be held to be inapplicable. The law relating to double presumptions has been considered in some American cases and the position has been aptly summarised in Field's *Law of Evidence* (12th Ed) Vol I at p 396:

> The law does not permit an inference or a presumption (*Direct Sales Co v United states*, 319 US 703; *Nation v United States* (CA 3d) 113 F 2d 97) to be based upon another inference or presumption. The danger of permitting inference to be based upon inferences or presumptions upon presumptions is that in such cases fact B would be presumed or inferred from fact A, and fact C would be presumed or inferred from fact B. This would in effect mean that fact C would be inferred or presumed from fact A. If the law would not permit fact C to be inferred or presumed directly from the existence of fact A it is manifestly improper to allow that presumption or inference to be made under the guise of a double inference or double presumption.
>
> The reason for the prohibition, however, indicates the exception which can be made whenever from the existence of one fact, that is A, common experience indicates that ordinarily B will exist and that if B exists, C will also exist, it is proper to infer or presume that C exists once it is shown that A exists (*Ribaste v United States* (CCA 8th) 44 F 2d 21; *Brown v State*, 219 Ind 21; *State v Dennis* 177 Or 73). Thus, in a prosecution for the unlawful possession of burglar tools, the jury may

infer from the fact of possession of the tools by the defendant's companion that the tools were in the defendant's possession and that he intended to use them feloniously (*State v Biyan*, 69 Ohio App 306).

[170] The objection to the operation of double presumptions is anchored on the fact that it would in effect mean that the second presumption is based on the basic facts of the first presumption when ordinarily it is not permissible in law. It is implicit that if the basic facts to be proved in respect of both the presumptions are different the objection cannot prevail.

[171] In order to determine whether the operation of the presumptions in s37(d) and s 37(da) is objectionable it must first be observed that the presumption of possession is, on its own, capable of amounting to a case of trafficking without the aid of a presumption. Section 39B(1) which creates the offence of trafficking does not prescribe any weight that is required in order to constitute the offence. In commenting on s 15 of the Singapore Misuse of Drugs Act which contains a presumption similar to that in s 37(da) Lord Diplock said in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 at p 69:

> Proof of the purpose for which an act is done where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible — even if there were no statutory presumption such as is contained in s 15 of the Drugs Act.
>
> As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. All that s 15 does is to lay down the minimum quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved alone that they were being transported for the purpose of transferring them to another person and not solely for the transporter's own consumption. There may be other facts which justify the inference even where the quantity of drugs involved is lower than the minimum which attracts the statutory presumption under s 15.

[172] It is therefore clear that possession of dangerous drugs can constitute trafficking without the aid of a presumption depending on the quantity of drugs involved. Section 37(da) fixes a minimum quantity that will lead rise to the presumption. Thus the dominant element that will activate s 37(da) is the weight of the drugs possessed and not possession itself. It follows that the presumption of possession arising from s 37(d) does not, on its own, raise the presumption of trafficking under s 37(da). Further evidence of the weight of the drugs involved must be adduced in order to invoke s 37(da) upon proof

of possession under s 37(d). The basic facts to be proved for the activation of both the presumptions are therefore different. In view of this difference it cannot be suggested that the presumption of trafficking is based on the basic facts of the presumption of possession. I pause to add that the requirement of different basic facts for the activation of s 37(d) and s 37(da) was indeed recognised in *Muhammed bin Hassan* but, unfortunately, was not analysed the way it should have been. It is my respectful view that it is the misapprehension of the circumstances in which a double presumption may be held to be inapplicable that led to the interpretation of s 37(da) the way it was done. As the double presumptions contained in s 37(d) and s 37(da) are clear in their requirement of the different basic facts to be proved they are not harsh and oppressive and must prevail even if the intention of Parliament in creating them is not clear. The restriction placed on the clear meaning of s 37(da) cannot therefore be sustained.

[173] In the circumstances it is my view that it is the intention of Parliament to allow the presumptions contained in s 37(d) and (da) to operate side by side. In the upshot, and with respect, I am unable to subscribe to the curtailment of the scope of s 37(da) in *Muhammed bin Hassan* to make it inapplicable to instances where possession has been presumed under s 37(d).

By majority affirming decision in Muhammad bin Hassan.

Reported by Loo Lai Mee